Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1996

STATE OF LOUISIANA,

Petitioner,

versus

JAMES E. DIVERS,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Louisiana

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Did the Louisiana Supreme Court base its reversal on a misinterpretation of the correct standard of law, set out in the U.S. Constitution as interpreted by the U.S. Supreme Court cases cited, when it reversed and remanded the entire case for retrial because it found the trial court had erroneously denied challenges for cause for two prospective jurors and the defendant had exhausted all of his peremptory challenges?

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BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The State of Louisiana, Petitioner, respectfully prays that a writ of certiorari to review the judgment of the Supreme Court of Louisiana in this be granted.

STATEMENT OF JURISDICTION

Jurisdiction in this matter is vested under the provisions of Supreme Court Rule X.

The State of Louisiana invokes the jurisdiction of this court pursuant to Rule X, Section (b) because the Louisiana Supreme Court's denial of the state's application for rehearing is in error. The Louisiana Supreme Court has misinterpreted a federal jurisprudential standard, and the denial will cause a material injustice and will significantly affect the public interest.

OPINIONS BELOW

FEDERAL

Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222 (1992)

Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 194 (1993)

Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI to the United States Constitution states:

In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV Section 1 states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I Section 17 of the Louisiana Constitution provides:

A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict. The accused shall have the right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury.

La.C.Cr.P. Art. 798(2) states:

It is good cause for challenge on the part of the state, but not on the part of the defendant:

(2) The juror tendered in a capital case who has conscientious scruples against the infliction of capital punishment and makes it known:

a) That he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him;

b) That his attitude toward the death penalty would prevent or substantially impair him from making an impartial decision as a juror in accordance with his instructions and his oath;

c) That his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt; or. . . .

INTRODUCTION

James Divers was tried and convicted on July 26, 1991 for a crime committed in 1988. The sentence set by the jury was the death penalty. The Louisiana Supreme Court on direct review reversed and remanded the entire case for retrial because it found that the trial court had erroneously denied two challenges for cause of prospective jurors, Honea and Pritchard, and the defendant had exhausted all of his peremptory challenges, although neither Honea or Pritchard ultimately sat on the jury.

The Louisiana Supreme Court based its finding on a violation of the standard set out in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) as clarified by *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) and *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). The standard is

incorporated in La.C.Cr.P. Art. 798(2). The Court defined the violation of the standard: "In a 'reverse-*Witherspoon*' context, the basis of exclusion is that the juror 'will not consider a life sentence and . . . will automatically vote for the death penalty under the factual circumstances of the case before him. . . . ' "

The State applied for a rehearing arguing to the Court that it applied an incorrect standard and that there was no prejudice demonstrated to the defense. The rehearing was denied on October 11, 1996.

This reversal based on a misinterpretation of the correct standard to be applied, a federal jurisprudential standard, has caused a grave injustice to the families of the victims as well as to the orderly and final prosecution of the law by the District Attorney on behalf of the people of this state. This grave injustice can only be corrected by this Court.

STATEMENT OF THE CASE

On April 12, 1988, two bodies were recovered from the Moon Lake Recreational area, Ouachita Parish, Louisiana, where they had been dumped.

Both victims were bound with their hands behind their backs, their feet were bound and they were gagged with men's neckties. Both victims had been shot in the head. One was dead at the scene, but the other victim, Stevenson, was transported to a local hospital where he died that same day.

A search was made for one victim's 1988 white Dodge Shadow; however, it was not immediately recovered. Nationwide messages concerning the vehicle identification and its possible connection to two murders were sent out via the NCIC computer.

On May 3, 1988, the vehicle was located by the Dallas, Texas police. The vehicle was backed into a parking space at the rear of an apartment complex. The vehicle was bearing a Texas plate on the rear, which plate had been stolen on April 22, 1988. The vehicle was seized and subsequently searched.

On May 4, 1988, two OPSO deputies went to Dallas after they learned from Dallas authorities that a black male named James was alleged to have been driving the car. A physical description of the black male was obtained. He was seen peeping out of the window at 2902 Cleveland Street, Apartment number 206, Dallas, Texas.

The officers went to that location. The manager of the apartment complex told the officers that a man named James, who was wanted for murder in Louisiana, was staying in the apartment. The officers asked for a pass key, however, the manger did not have one. The officers, accompanied by the manager, discovered an unlocked window. They opened the window, reached in, and unlocked the door. Inside the apartment, the officers located a black female. She denied that a man named James was in the apartment. The officers, armed with the information that James was there, continued their search. The officers located a closet which had chairs stacked in front of it. When they reached for the door, the door fell. Inside the closet, the officers located a black male fitting

the description they had received. He identified himself as Jessie Divers. He was taken to the Dallas Police Department. It was later learned that Jesse Divers was the man's brother. The man's real name was James. He finally admitted as much.

Divers advised the police that he obtained the Dodge Shadow from two black male drug users after trading drugs for it. Divers was subsequently booked into the Dallas County jail for unauthorized use of a motor vehicle.

The lessee of the apartment where Divers was located, Felder, later gave a statement to the police. She stated that Divers moved into her apartment on March 28, 1988. He left Dallas on April 4, 5, or 6 and returned to Dallas on April 12, 1988, the same day the bodies were discovered. He was driving the Dodge Shadow. He told Felder that he had gotten the vehicle from two homosexuals, but later told her that he had gotten the vehicle from his uncle.

Divers later waived extradition and was returned to Ouachita Parish on July 15, 1988. The Ouachita Parish District Attorney obtained, on July 6, 1988, an indictment for the murders after receiving information from Divers' cousin, Everette English, that Divers had killed the victims.

Authorities later learned that Divers had admitted to another inmate, Thompkins, while in the Dallas jail that Divers had killed two men. Even later, it was learned that Divers also admitted to one Donald Elledge, a Ouachita Parish inmate, that he had killed the two men. Both jail house informants testified at trial.

The evidence seized from 1403 Mississippi Street, was analyzed by authorities. Divers' fingerprints were found on beer cans and glasses seized from inside Vandervield's home. A shoe print which matched Divers' shoes, was located in Vandervield's carport. Diver's denied ever being in Vandervield's home.

English, Divers' cousin, refused to testify against Divers, although English had previously been tried and convicted of manslaughter.

Divers was subsequently tried and found guilty as charged of two counts of first degree murder. A unanimous jury determined that Divers should be sentenced to death. He was so sentenced.

Divers filed a direct appeal to the Louisiana Supreme Court. On September 5, 1996, the Louisiana Supreme Court, finding merit to defendant's argument that two jurors should have been excluded for cause during voir dire but were not, reversed the conviction and sentence and remanded the case for new trial. The State applied for rehearing. On October 11, 1996, rehearing was denied.

Over a period of six days, eighty-four (84) jurors were examined during voir dire. The trial court granted fifty-three challenges for cause, twenty-four (24) to the State, twenty-two (22) to the Defense and seven (7) on its own motion. The Defense exercised twelve (12) peremptory challenges while the State exercised seven (7).

The Louisiana Supreme Court has reversed this entire conviction and sentence because it found that two challenges for cause were erroneously denied to the defense, those challenges of jurors Honea and Pritchard.

JUROR HONEA

During voir dire, Ms. Honea expressed no adamant or unswervable conviction for the death penalty. She was fully voir dired by the prosecutor (R.p. 3039 et seq.) concerning the law and the fact that the jury could not automatically impose the death penalty just because they had already voted guilty. (R.p. 3041). Ms. Honea was specifically asked:

> Q. And would you say, "Well, just because he's been convicted I think he automatically ought to get death", or would you say, "No, I can agree with the law that just because he's been convicted of first degree murder he doesn't automatically get death. I have to hear aggravating circumstances. . . . "
>
> A. By Ms. Honea: Yes.

Ms. Honea was confused (R.p. 3050) about defenses to murder and also about what she'd do as to the penalty for a killing if "they specifically intended it . . . " (R.p. 3051) to which she indicated " . . . I guess that's what I'd do." (impose the death penalty) but when further asked by defense counsel (R.p. 3051) "would you . . . would you even consider giving somebody a life sentence, a sentence of life imprisonment if you . . . " her reply was "Well like . . . like you say you come back over on this side and you go through other . . . other deal . . . other things, then maybe. . . . " A juror which defense counsel found acceptable on the same panel as Ms. Honea was Kandi Shaw Pate. Ms. Pate had stated (R.p. 3048) that if she had already voted guilty and did not hear any mitigating circumstances from the defendant that she would impose the death penalty, her answer (R.p. 3048) "Death penalty

more than likely." Ms. Honea later (as Ms. Pate did) indicated that if she heard no mitigating evidence then "Well, I would still be the same if I didn't hear nothing different . . . I'd still say capital punishment." (R.p. 3051).

The juror attempted to explain what she'd consider mitigating (R.p. 3052) and stated "I really don't believe in just taking a life for a life. I don't believe in that." Defense counsel persisted with this juror until he got the answer he wanted (R.p. 3054), "No, I wouldn't consider life." but that incorrect answer cannot be isolated out of all her other answers.

It is obvious from the entire voir dire of the panel of four jurors, including Ms. Honea, as the prosecutor noted in several objections, that these jurors were seriously badgered by defense counsel and their answers that they were not sure what they would do were not accepted by defense counsel who instead re-asked the same question (see exchange at R.pp. 3056 and 3057 with Juror Grafton) whereupon the judge ordered La. Code of Criminal Procedure Article 905.3 read to the jury panel. They all agreed they could follow this law. The defense then offered a challenge for cause on Ms. Honea (R.p. 3060) which was denied. Ms. Honea later stated (R.p. 3071) that she could vote not guilty if the state didn't prove its case.

Ms. Honea was excused on a defense peremptory challenge.

JUROR PRITCHARD

On this panel were four jurors, Cheryl Williams Newton, Norman Dean, Mickey Murphy and Michael Pritchard. Both Newton and Dean were excused on defense challenges for cause on venue issues (pretrial publicity, prejudice, etc.).

Mr. Pritchard was examined on the death penalty issue (beginning on R.p. 3370). He was very *clear* that he would not automatically vote for the death penalty (See R.p. 3370-line 6 through p. 3371 line 5). Mr. Pritchard expressed an opinion that all murders with specific intent to kill ought to be first degree murder, i.e. possible death sentence. The Louisiana Supreme Court stated in its opinion that this is the "fundamental problem with Pritchard." Under Louisiana law, it is not grounds for a challenge for cause that the juror disagrees with the law if he indicates he'll be able to set his opinion aside and accept the law as given to him by the court. *State v. Lee*, 559 So.2d 1310 (La. 1990). In its opinion, the Louisiana Supreme Court noted that when asked if he would be able to leave his personal views aside, he " . . . Pritchard expressed doubt that he would be able to do so." This was in response to a question about whether "the death penalty should be involved as a possibility" (R.p. 3374). This juror was not expressing an opinion on how he would vote in the penalty phase of a first degree murder conviction but expressing his opinion on the **irrelevant** issue of whether the death penalty should be available in all cases where there was specific intent to kill and not just those specific instances enumerated in the first degree murder statute.

The defense examination of Mr. Pritchard's opinion about any automatic penalty began with his voir dire on R.p. 3375. Pritchard told defense counsel (at p. 3376) that " . . . I mean I'd like to say that I would ignore it, my feelings about it, but I couldn't tell you that." Pritchard indicates (at p. 3376) that he **thinks** once he voted guilty of first degree murder then his decision in the second part (penalty) would be made for him. In an attempt to clear up any confusion about Mr. Pritchard's equivocal answers – that he'd **like** to say he could ignore his feelings and **he thinks** his decision would be made for him on the penalty, Mr. Pritchard was re-voir dired by the State, (beginning at R.p. 3380) wherein the difference between first degree murder and second degree murder was explained and he was specifically asked (R.p. 3383) "Now, even though you don't agree with that statute, can you accept that that's what the law is? That first degree statute, that's what the law is at this time?" To which he responds "I can accept what it is." He is then asked (R.p. 3384) if he would automatically vote for the death penalty because he voted guilty of first degree murder or would he be able to consider the option. His answer "Well, I hope I would. I hope I would not go fishing for some excuse to come up with first degree." The juror indicated that he had an opinion that premeditated murder should carry the death penalty (R.p. 3384) but "I think I can look at it, yeah. I may not agree with it, but I think I can look at it." (i.e. can look at mitigating circumstances). (At R.p. 3387), he stated he'd do his best to follow the law but he couldn't guarantee anything.

The court then examined Mr. Pritchard (R.p. 3387) after which he stated that he understood that his duty as

a juror would be to apply the law regardless of his personal feelings about the law. Mr. Pritchard explained that "I don't know if I making myself. . . . " (clear) to which the Court responds that he was. This was the crux of the issue – that the judge understood the juror's statements given within an entire context of his voir dire and his statements did not indicate an unwillingness to follow the law or an intent to automatically impose the death penalty.

A challenge for cause by the defense was denied, whereupon the defense exercised a peremptory challenge to remove Mr. Pritchard.

The defense used all twelve of its peremptory challenges, and why not when the exhaustion factor provides them a presumption of prejudice. It is very apparent that the perempt of Mr. Murphy, the very next juror after Mr. Pritchard was nothing more nor less than trial tactics because his answers on voir dire were extremely neutral. With the twelfth perempt of Mr. Murphy, however, the presumption was a given.

Is the presumption of prejudice an irrebuttable presumption? Does the fact that the defense after exhausting twelve challenges had no challenges left to cut the twelfth juror selected, one Earlean Bass, a black female, demonstrate the effects of this prejudice? The defense peremptied only white jurors. Therefore, it is presumed that they wanted black jurors. This exhaustion resulted in the selection of a twelfth juror of the profile that the defense exhibited a preference for, a black female.

On this last panel, #20, from which Ms. Bass was selected, she was the last juror left of the four originally

on the panel after the other three jurors were excused either on cause challenges by the defense, Whitlock (w/f) and Lawson (w/m) or the court, Wanda Franks (w/f).

It is noteworthy on this issue of prejudice, that the defense had absolutely no problem with Ms. Earlene Bass although the defense attorney offered a challenge for cause on the entire panel (R.p. 3491) based on remarks made by Mr. Lawson. Where's the prejudice to the defense if they got **stuck** with just the type of juror they wanted and in a case where each vote counted, unanimous at both stages?

This is the issue, what happens when your perempts are exhausted not just that they are exhausted.

ARGUMENT

This issue was addressed in *Ross v. Oklahoma*, 108 S.Ct. 2273; 487 U.S. 81, 101 L.Ed.2d 80 (1988). In *Ross*, the challenged juror stated he would vote to impose the death penalty automatically if the jury found the defendant guilty, a defense challenge for cause was denied whereupon the defense used a perempt to remove the juror and exhausted all of its peremptory challenges. The basis for the challenge for cause was a *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) violation. The Court, in affirming the conviction and death penalty, noted (at p. 2276) that none of the twelve jurors *seated* had been challenged for cause by the defendant.

The State of Louisiana's position is that neither of the two challenges for cause (Honea and Pritchard) whose denial were found erroneous, were valid challenges for cause under *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). However, even if the jurors should have been excused and even though the defense exhausted all of its peremptory challenges, there was no error because none of the twelve jurors who sat had been challenged for cause, i.e., there was no prejudice to the defense. As the court stated in *Ross* (at p. 2277), "Any claim that the jury was not impartial, therefore, must focus not on Huling (a juror with a good challenge for cause denied and in our case jurors Honea and Pritchard), but on the jurors who ultimately sat." The Louisiana Supreme Court focuses their reversal entirely on Jurors Honea and Pritchard, who were cut on defense perempts, and did not examine the jurors who ultimately sat. The Court in *Ross* stated (R.p. 2278) " . . . we reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury." In *Ross*, the Court in considering the denial of due process argument stated (p. 2279) " . . . the 'right' to peremptory challenges is 'denied or impaired' only if the defendant does not receive that which state law provides." The state law of Oklahoma, examined in *Ross*, provided that an erroneous denial of a challenge for cause was grounds for reversal only if the defendant exhausted all peremptory challenges and an incompetent juror was forced upon him. According to the Louisiana Supreme Court's opinion (at p. 6), Louisiana law, based on the interpretation of *Witherspoon* and *Witt*, provided that "*prejudice is presumed* when a challenge for cause is

denied erroneously by a trial court and the defendant has exhausted his peremptory challenges." This formulaic approach to a federal constitutionally mandated standard is unworkable. Louisiana law codified the standard set out in *Witherspoon v. Illinois*, as clarified by *Witt* in Louisiana Code of Criminal Procedure Article 798. The Louisiana Supreme Court stated (Opinion at p. 7):

> The basis of exclusion under La.C.Cr.P. art. 798(2)(a), which incorporates the standard of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), as clarified by *Witt*, is that the juror "would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him. . . . " In a "reverse-*Witherspoon*" context, the basis of exclusion is that the juror "will not consider a life sentence and . . . will automatically vote for the death penalty under the factual circumstances of the case before him. . . . " *State v. Robertson*, 92-2660 (La.1/14/94); 630 So.2d 1278, 1284. If a prospective juror's inclination toward the death penalty would substantially impair the performance of the juror's duties, a challenge for cause is warranted. *State v. Ross*, 623 So.2d 643, 644 (La.1993).

The substantially impaired language in *State v. Ross*, supra, was based (in Ross) on the *Witt* decision. The Louisiana Supreme Court also based its reversal in *Divers* on *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). In *Morgan*, the trial court conducted the entire voir dire and although it asked jurors, at the request of the State, whether they would automatically vote against the death penalty, the trial court refused to

ask the "reverse-*Witherspoon*" question requested by the defense, whether they would automatically vote to impose the death penalty regardless of the facts. The conviction in *Morgan* was reversed on due process grounds because the system of voir dire used did not guarantee a fair and impartial jury to the extent commanded by the Sixth Amendment.

In *State v. Maxie*, 653 So.2d 526, 534 (La. 1995), Juror Rains exhibited a "predisposition to **automatically** impose the death penalty in the event that the defendant was found guilty at the guilt phase of the trial." (emphasis supplied). This juror clearly stated she was predisposed to imposing the death penalty and her mind was not open to both the death penalty and life imprisonment and the death penalty should be imposed once the defendant's guilt was established. That was a clearly adamant juror.

In *State v. Robertson*, 630 So.2d 1278, 1281 (La. 1994), the Court stated that at issue in the case was " . . . a challenge for cause based on a potential juror's **apparent** predisposition to **automatically** impose the death penalty, regardless of any evidence that might be developed at the trial or the sentencing hearing, and regardless of the fact the law requires a juror to consider mitigating circumstances in the sentencing phase." (Emphasis supplied). The offending juror was a Mr. Payne. He clearly stated he would not be able to consider a life sentence (where two people were killed, as the facts would develop in the case). Payne later stated once Robertson was convicted of both counts of first degree murder he would **automatically** vote for the death penalty without regard to evidence in mitigation.

In *State v. Ross*, 623 So.2d 643 (La. 1993), Juror Davis responded to voir dire on the death penalty but stated that for him the death penalty would be the **only penalty** for first degree murder and although he could consider both penalties, personally his vote would be for the death penalty.

In *State v. Lee*, supra, Justice Calogero succinctly stated the test to be followed in assessing whether to grant a challenge for cause, the test of looking at the juror's responses during her entire testimony. The operative words are **look** and **entire**. Only Judge Michael Ingram looked at these two jurors in a neutral manner. It is very clear from this record that Judge Ingram was extremely generous to the defense on all their requested challenges for cause; he in fact granted 22 to the defense over a period of six full days of voir dire.

All of these cited cases: *Maxie, Robertson, Ross,* and *Lee* provide guidelines to the trial judge, prosecution and the defense which were not impossible to follow, but this decision overturning Divers' conviction incorrectly applied the Louisiana Constitution's guarantee of a full twelve peremptory challenges to the defense. The denials of the challenges for cause on these two jurors were sound because they both indicated an ability and willingness to follow the law and no adamant predispositions. Voir dire to these jurors was very confusing but they never exhibited grounds for challenge for cause. Lack of clarity in a juror's answers is not the dispositive test. *Wainwright v. Witt*, 469 U.S. 412, 423; 105 S.Ct. 844, 83

L.Ed.2d 841 (1985). See *State v. Lee*, 559 So.2d 1310, 1318 (La. 1990).

CONCLUSION

Jury selection is presided over by a trial judge charged with the duty of insuring a fair process. Whether or not this process was fair must be considered after a review of the entire jury selection. The defense was granted 22 challenges for cause. Under the Sixth Amendment, the Fourteenth Amendment, *Witherspoon, Witt, Ross v. Oklahoma* and *Morgan v. Illinois,* the defense was accorded due process and allowed full voir dire on the "reverse-*Witherspoon*" issue. This case was reversed based on two challenges for cause out of 24 plus made by the defense. The two challenges for cause were not improperly denied under Federal laws or Louisiana law.

Respectfully submitted,

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SEP 5, 1996

SUPREME COURT OF LOUISIANA

No. 94-KA-0756

STATE OF LOUISIANA

v.

JAMES E. DIVERS

Appeal from the Fourth Judicial District Court,
Parish of Ouachita,
Honorable Michael S. Ingram, Judge

JOHNSON, Justice.*

On July 6, 1988, a grand jury in Ouachita Parish indicted James E. Divers for two counts of first degree murder, in violation of R.S. 14:30. On July 26, 1991, following a jury trial, the defendant was found guilty as charged on both counts. The jury then recommended the death penalty, having found two statutory aggravating circumstances, namely: (1) the offender was engaged in the perpetration or attempted perpetration of armed robbery, and first degree robbery; and (2) the offender knowingly created a risk of death or great bodily harm to more than one person. La.C.Cr.P. art. 905.4.

On direct appeal to this court under La. Const. Art. 5, § 5(D), the defendant assigns 95 assignments of error of which 61 were briefed. Finding merit in his argument that certain jurors should have been excused for cause but

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* Pursuant to Rule IV, Part 2, Section 3, J. Marcus was not on panel.

were not, we reverse the conviction and sentence, and remand this case for a new trial.

FACTS

On April 12, 1988, two college students reported to the police that, while walking for exercise at the Moon Lake recreational area in Monroe, Louisiana, they came across what appeared to be two dead bodies. The authorities arrived and discovered two bound and gagged black men: Winston Vandervield,[1] who was dead, and Simmie Lee Stevenson, who was unconscious. Each man had been shot once in the head with a small caliber weapon. Vandervield's mouth was taped shut with duct tape and his ankles and wrists were bound with men's neckties. His sweatpants were pulled down around his ankles and his underpants were pulled low, exposing his pubic hair. Stevenson was gagged with a piece of cloth and some men's neckties. His wrists were bound with a length of electrical cord and more neckties. Vandervield did not appear to have been injured in any other way, but Stevenson had several small lacerations on his face. Stevenson was transported to a local hospital where he died as a result of his injuries.

Stevenson's car, a 1983 maroon Chevrolet Monte Carlo, was found in nearby Sterlington, Louisiana,[2] and

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[1] Vandervield's name at birth was Otis Keith Straughter. While living in California, he legally changed his name to Winston Vandervield. Both names appear in the record, but to avoid confusion only the name "Vandervield" will be used here.

[2] The record shows that Divers was born in Sterlington, La.

was seized by the police. Blood and pillows covered in blood were found in the Monte Carlo's trunk and blood was found in the car's back seat. In addition, a piece of electrical cord like the one used to tie Stevenson's wrists was found in the trunk. Stains made by the victims' blood were also found on the carpet of Vandervield's house at 1403 Mississippi Street in Monroe. Because there was blood in the house and car, it appeared to the police that at least one, if not both of the victims had been shot at the house. However, the police left open the possibility that one of the victims was shot at the Moon Lake location. "The Moon Lake Murders" as they were dubbed by the press at the time, generated a fair amount of publicity, although it was noted by some reports that this was not the first time that the Moon Lake recreational area had been used as "a dumping ground for bodies."

The police got its first break in the case about a month after the bodies were found. The Dallas police reported that they had located Winston Vandervield's 1988 white Dodge Shadow, which had been missing since the night of the murders. The person who had been seen driving the car was the defendant, who was then apprehended and questioned by the police. The defendant gave his name as "Jessie Divers," and claimed he had gotten the car in Dallas by trading some addicts about $250 worth of cocaine for it. A check of police records provided information which confirmed that the defendant's first name was James, not Jessie. Jessie was the name of defendant's brother. Divers maintained that he had not been in Monroe since February, 1988 and that he had never met Vandervield or been to his house. However,

Divers' fingerprints were found on several items in Vandervield's house.

A few days after Divers was arrested in Texas, his cousin, Everett Tyronne English, was arrested in Monroe in connection with the "Moon Lake Murders." English confessed to having been involved in the events leading up to the deaths of Vandervield and Stevenson and gave several statements, including a recorded statement. In this statement, English portrayed Divers as the ringleader and himself as a hapless youth who unwittingly found himself in the wrong place at the wrong time, however he refused to testify against Divers and his statements were ruled inadmissible. Divers was then confronted by the police with the fingerprint evidence linking him to Vandervield's house and with English's statements, but Divers still refused to make an inculpatory statement.

However, two of Divers' cellmates came forward to claim that Divers had confessed to them. Their testimony was given pursuant to a Motion To Perpetuate testimony. There was no indication that the two informants knew each other or were working in concert. One of them, Joel B. Thompkins, had been in a "tank" with the defendant in a Dallas jail, whereas the other, Donald Jack Elledge, had been housed with him in the Monroe jail. Each informant approached the authorities individually and each gave similar, although not identical, information which they claimed had been provided to them by Divers. Both claimed that Divers had admitted to them that he killed the two men found at Moon Lake.

On March 4, 1991, Thompkins testified that Divers had bragged to him that he "killed two homosexuals in

Louisiana but got caught in Dallas because he had the car." He claimed that Divers had been "pimping punk",[3] however, he said that Divers' real motive for going to Vandervield's house on the night in question was to commit a robbery. He went on to say that Divers's cousin had voluntarily participated in the robbery, but that he "just flipped on [Divers]" when the violence started. Divers claimed that his cousin urged him not to kill the victims, prompting Divers to want to kill his cousin as well. Thompkins also claimed that when Divers learned that his cousin had made a statement to the authorities, Divers said he was going to make it look like his cousin did it.

Subsequently, on April 2, 1991, Elledge testified that Divers first approached him to ask for assistance with his case.[4] Elledge said that Divers then told him that he (Divers) had pulled the trigger on both victims. Divers told Elledge that he killed these men because he had been having a homosexual relationship with one of them and when Divers discovered that Vandervield was HIV positive he became concerned that others would find out about it. He further stated that Divers also told him that he killed the men and disposed of their bodies in the way he did to make it look as if their deaths had been incidental to a robbery. Elledge said that Divers' cousin had been a willing participant in the robbery, but that the cousin

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[3] This term meant that one or both of the victims had been paying Divers money to engage in homosexual intercourse with them.

[4] During his testimony, Elledge described himself as a "jailhouse" writ writer.

had turned Divers in for the murders, making a lengthy statement against him. Elledge also said that Divers told him about a plea bargain he had been offered.

Trial Proceedings

During trial, voir dire was conducted over several days. The judge did not deny the defendant's change of venue motion until a jury had been selected. The judge opted not to conduct individual voir dire, but questioned the jurors in panels of four to contain the risk of taint from any prejudicial comments. Both the State and the defendant challenged many prospective jurors for cause.

The State employed a "check one of the above" approach, arguing to the jury that the defendant was guilty of two counts of first degree murder because he intentionally killed two people either: (1) during the commission of an enumerated felony, such as armed robbery, first degree robbery, simple robbery, aggravated kidnapping, or second degree kidnapping, or (2) with the specific intent to kill or inflict harm on more than one person.

The defendant presented an alibi defense through the testimony of two witnesses who claimed that, although the defendant was in fact in Monroe on the night in question (contrary to what he told the Dallas police), he spent the entire evening attending a barbecue and chaperoning a 14-year old family friend. The prosecution presented no rebuttal. The jury deliberated for one hour and 18 minutes before returning guilty verdicts on both counts of first degree murder.

Twenty minutes after the jury returned its verdicts in the guilt phase, the trial court commenced the penalty phase. The prosecution introduced the testimony of one witness, a Los Angeles police officer who arrested the defendant on prior felony charges and submitted the testimony and evidence presented in the guilt phase. Divers took the stand and stated that, although he had once been addicted to PCP, he had never sold the drug and had not used it since 1986. The defendant's mother and aunt (Mary English, the co-defendant's mother) both testified in his behalf. The final defense witness was Dr. Doyle Preston Smith, a specialist in addiction medicine, who testified to the effects of long-term narcotics addiction. The sole rebuttal witness was Linda Jones, a former girlfriend of the defendant, who disputed the defendant's testimony that he never dealt PCP.

The jury deliberated for two hours and 15 minutes before returning its recommendation that the defendant be sentenced to death. Although the defendant was convicted of two counts of first degree murder, the state asked for a single verdict and the jury returned only one penalty phase verdict.

After the jury filled out written polling slips, confirming its verdict, the jurors were released. Shortly thereafter, it was discovered that one juror had checked both "life imprisonment" and "death penalty" on her polling slip. This juror was contacted by telephone and she stated that this was an inadvertent mistake and that her vote was for death. She executed an affidavit containing this version of events. At a hearing held over a month after the trial, she testified consistently that she had mistakenly checked both boxes although she only meant

to check death. Her explanation for her error was that she was distracted because she was helping an elderly juror fill out his polling slip. The trial court accepted her testimony and denied the motion. On September 12, 1991, the judge sentenced the defendant to death by lethal injection.

DISCUSSION

In his first two assignments of error, relator states that the trial judge erred by refusing to grant his cause challenges to prospective jurors. He argued that venirepersons Pritchard and Honea both expressed the belief that all "deliberate" or "intentional" killings should automatically be punished by death, therefore his denials for cause challenges constituted reversible error.

Our jurisprudence states that prejudice is presumed when a challenge for cause is denied erroneously by a trial court and the defendant has exhausted his peremptory challenges. An ruling depriving an accused of a peremptory challenge violates his substantial rights and constitutes reversible error. *State v. Maxie*, 653 So.2d 526, 534 (La.1995); *State v. Robertson*, 630 So.2d 1278, 1280-81 (La.1994); *State v. Ross*, 623 So.2d 643, 644 (La.1993); *State v. Bourque*, 622 So.2d 198, 225 (La.1993); *State v. Lee*, 559 So.2d 1310, 1317 (La.1990); *State v. Brown*, 496 So.2d 261, 263-64 (La.1986). Also, *Maxie, supra*, states that in order to prove the presence of reversible error warranting reversal of both the conviction and sentence, the defendant need only show the following: (1) erroneous denial of a challenge for cause; and (2) use of all of his peremptory challenges. Here, the record shows that Divers exhausted

all of his peremptory challenges, therefore our efforts will focus on whether or not defendant's challenges for cause of certain perspective jurors were erroneously denied.

The proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852 83 L.Ed.2d 841, 851-852 (1985); *State v. Sullivan*, 596 So.2d 177 (La.1992), rev'd on other grounds *sub nom. Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 194 (1993). The basis of exclusion under La.C.Cr.P. art. 798(2)(a), which incorporates the standard of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), as clarified by *Witt*, is that the juror "would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him. . . . " In a "reverse – *Witherspoon*" context, the basis of exclusion is that the juror "will not consider a life sentence and . . . will automatically vote for the death penalty under the factual circumstances of the case before him. . . . " *State v. Robertson*, 92-2660 (La.1/14/94); 630 So.2d 1278, 1284.[5] If a prospective juror's inclination

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[5] The "substantial impairment" standard applies to reverse-*Witherspoon* challenges. In *Morgan v. Illinois*, 504 U.S. ___, 112 S.Ct. 2222 (1992), the Supreme Court held that venire members who would automatically vote for the death penalty must be excluded for cause. The Court reasoned that any prospective juror automatically voting for death would fail to consider the evidence of aggravating and mitigating

toward the death penalty would substantially impair the performance of the juror's duties, a challenge for cause is warranted. *State v. Ross*, 623 So.2d 643, 644 (La.1993).

Venire member Michael Pritchard

Pritchard was unsuccessfully challenged for cause by the defendant on three separate occasions. The first challenge related to the venue issue and the risk of taint from a fellow panel member's comments. Pritchard recalled reading and hearing about the Moon Lake murders in 1988, but didn't remember much and didn't follow the case. However, he heard fellow panel member Cheryl Newton state that she had discussed the case with her ex-husband, a private investigator while he was working on the case and that these discussions led her to form the opinion that Divers was guilty. Ms. Newton then said that it would be hard for her to be fair because "I think I know more than what was in the paper." After Ms. Newton made these comments, the other panel members were asked whether what they heard had affected them. Pritchard replied, "Well, I don't think it helps to hear what I just heard, but I don't know what she knows." The defense attorney asked Pritchard whether what he heard

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circumstances, thus violating the impartiality requirement of the Due Process Clause. 112 S.Ct. at 2229. The *Morgan* Court adopted the *Witt* standard for determining if a pro-death juror should be excused for cause. In other words, if the juror's views on the death penalty are such that they would "prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths," whether those views are for or against the death penalty, he or she should be excused for cause.

might influence his deliberations and he responded, "I can't tell you that they wouldn't enter my mind. As far as influence my decision I don't think it would but I can't guarantee you that, no."[6]

The defendant's cause challenge to Pritchard on the basis of the harmful effects of Newton's comments was denied. When asked about his ability or intention to do certain things, Pritchard frequently equivocated or qualified his answer. For example, when the prosecutor asked him whether he would automatically recommend death if he found the defendant guilty or he would consider everything, Pritchard responded, "I would hope I would consider the circumstances involved."

The fundamental problem with Pritchard was his disagreement with the law on penalties for murder. He felt that both first degree and second degree murder should carry the death penalty. He stated that, in his view, "if it's premeditated whether it's in the act of a robbery or all of the other things that you listed (elements of first and second degree murder), the death penalty should go along with it." The defense attorney asked him if he would be able to leave his personal views aside, and Pritchard expressed doubt that he would be able to do so. The defense attorney then tried to ascertain the implications of Pritchard's views, asking "[Y]ou're not certain that you would be able to follow that law because you disagree with it?" Pritchard responded by equivocating,

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[6] One of the two other panel members, venireman Murphy, said these comments would not affect him. The other panel member, venireman Dean, admitted, "She influenced me, yes." Dean was removed at the defendant's request for cause.

saying, "All I can say is I think I would. But, no, I can't guarantee you that."

The following colloquy then occurred:

> Q (by the defense attorney):. . . . Now, what I'm wanting to know, sir, from you is, you've already made a decision guilty of first degree murder under the facts I've given you. Okay? Now, are you simply going to seat (sic) here and go through this process as things are presented to you basically, you know, go through the motions and just wait to vote for the death penalty because you've already voted guilty?
>
> A (by Mr. Pritchard): Sounds like what I'm saying. If I believe . . . believe that something is first degree murder and it's premeditated, and I've got my opinion that the death penalty should go along with it, I can't help what the law says. That if there were mitigating circumstances or not . . . I mean I'd like to say that I would ignore it, my feelings about it, but I couldn't tell you that.

In an attempt to rehabilitate Pritchard, the prosecutor then tried to spell out the differences between first degree and second degree murder. She then asked him whether he would look for a way to convict the defendant of first degree murder so he could recommend the death penalty " . . . or are you going to be able to do what the law requires a juror to do in a case like this, to consider the options . . . " Pritchard answered, "Well, I hope I would. I hope I would not go fishing for some excuse to come up with first degree (murder)." The following exchange then occurred:

Q (by the prosecutor): You consider yourself a trigger happy person or something or somebody . . .

A (by Mr. Pritchard): Trigger happy?

Q: You know, somebody who thinks that you have to automatically give somebody the death penalty?

A: As I've said before, to me when it's premeditated they should carry the death penalty. But, as I said, that's an option.

Q: That's an option.

A: That's all it is.

Q: All right. And are you going to take your opinion and say, "That's my opinion, but when the judge reads me the law" . . . because the judge is going to give you the law. Are you going to be able to say, "When the judge gives me the law I'm going to apply that law and I'm not going to apply Pritchard's law"?

A: I sure hope I'm going to. But, I know he's going to ask me can you guarantee me that. . . .

Q: Well, I don't know if anybody's going to ask you to. . . .

A: No. I can't guarantee anything.

Pritchard's stubborn refusal to "guarantee" or commit to his ability to follow the law provided a solid basis for a cause challenge. This was particularly problematic because he refused to state that he would accept the law as provided by the court concerning the imposition of penalties. Moreover, Pritchard was clearly predisposed to vote for the death penalty in any "premeditated" murder case, even a case which was a second degree murder.

Furthermore, Pritchard refused to state definitively that he would put aside this "opinion" in order to serve as a juror. His answers were substantially worse than those of the juror in *Ross*, therefore, if the juror in *Ross* was unfit to serve on the basis of his responses, Pritchard's answers absolutely rendered him unfit.

Clearly, Pritchard was not only unable to follow the law, he was also unable to serve impartially. The defendant's cause challenge should have been granted on this basis. La.C.Cr.P. art. 797 §§ (2), (4).[7]

Venire member Marie Honea

Marie Honea reported for jury service having never set foot in a courtroom before. Her lack of knowledge of legal concepts was apparent from her first comments on the death penalty: "If he is found guilty . . . of killing whoever was killed, was it one, two or four, whoever was killed, then I would say he'd get the death penalty." She then stated that she believed that the death penalty was for guilty people and life imprisonment was for people

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[7] Furthermore, Pritchard's law enforcement ties exacerbated the problem. He was a revenue officer for the I.R.S. and had been for the past 14 years. R. at 3388-3389. When questioned about his responsibilities, he allowed that he conducted investigations. He also stated that he had powers of seizure, although not arrest. R. at 3397. He would not go into detail about his relationship with people at the sheriff's and district attorney's offices "because of the privacy act." However, he stated that most revenue officers and law enforcement personnel get to know each other over time. R. at 3399. The defendant's third unsuccessful chalienge to Pritchard was on the basis of his law enforcement ties. R. at 4678-4679.

who were not found guilty but the prosecutor's explanations seemed to clear up some of her misunderstandings.

The defense attorney then questioned her about the death penalty and discovered that she believed that the only penalty for intentional murder, regardless of mitigation, was death:

> Q (by the defense attorney): Okay. All right. If you thought somebody was guilty of murder what would be your decision about their punishment?
>
> A (by Mrs. Honea): If they murdered the person and meant to murder them, you know, that was there (sic) intent to murder them, I say capital punishment.
>
> Q: Yes, ma'am.
>
> A: But, if it was different reasons then it would come into this other deal you was talking about. It would come into what . . . like when you come over here you find maybe . . . maybe he had a reason. Maybe this person was going to kill him. See?
>
> Q: Yes, ma'am. Now,. . . .
>
> A: So, . . .
>
> Q: . . . You understand if the person was going to kill him and he could prove that, that would be like self-defense?
>
> A: Yes.
>
> Q: All right.
>
> A: So, it wouldn't be murder . . . Well, I . . . I really don't see . . .

Q: Well, I'm not . . .

A: All I believe in, if you kill somebody . . . I believe in capital punishment. That's all I believe in. If you deliberately kill somebody.

Mrs. Honea kept raising the issue of self-defense, which she seemed to believe was the only thing which could "mitigate" a murder. She appeared utterly unable to comprehend the distinction between a defense in the guilt phase and a mitigating factor in the penalty phase. Insofar as she was able to consider what she might do if no mitigation evidence was produced in the penalty phase, she stood by her view that intentional murders should always be punished by death:

Q (by the defense attorney): What if you didn't hear anything (in mitigation), ma'am?

A (by Mrs. Honea): Well, I'd still be like I was over (in the guilt phase).

Q: If you didn't hear anything about a good reason. . . .

A: Yeah.

Q: . . . then it's death penalty?

A: Yes.

Q: And you wouldn't consider life? You have to answer out loud.

A: No, I wouldn't consider life.

Shortly thereafter, the judge addressed the jury and read to them articles 905.2 and 905.3 of the Code of Criminal Procedure, concerning sentencing hearings and jury findings for death sentences. He then asked each juror in turn whether he or she could accept the law as he

would give it and his instructions. Mrs. Honea answered "Yes" when it was her turn. This was the extent of the rehabilitation on this issue. The judge then denied the defendant's cause challenge to Mrs. Honea and the voir dire proceeded. At the close of the voir dire of this panel, the defense challenged this prospective juror for cause based on her death penalty views and her inability to follow the law as to the presumption of innocence, and again the challenge was denied.

Defendant's cause challenge to Mrs. Honea should have been granted. Mrs. Honea clearly stated that in a case of "intentional murder" she would only consider the death penalty and would not consider life imprisonment. No individual rehabilitation was attempted by the prosecutor, nor did Mrs. Honea specifically abandon this view. She merely made a single general affirmation of her ability to follow the law when asked to do so en masse with her fellow panel members. On the whole, her responses consistently demonstrated her inability to set aside her views and be impartial on the issue of punishment.

Because of their responses during voir dire, and because of the inadequate rehabilitation of these jurors, the court's refusal to grant the cause challenges to Pritchard and Honea constituted reversible error. See Ross, at 644 where the trial court committed reversible error by failing to excuse a juror whose "personal opinion" was that the death penalty should be the only penalty for first degree murder, even though the juror claimed that he could consider both penalties.

DECREE

For the reasons assigned, defendant's conviction and sentence are reversed, we pretermit discussion of defendant's other assignments of error and remand this case to the district court for a new trial.

REVERSED; CONVICTION VACATED; REMANDED.

SUPREME COURT OF LOUISIANA

SEP 5 1996

No. 94-KA-0756

STATE OF LOUISIANA

Versus

JAMES E. DIVERS

ON CAPITAL DIRECT APPEAL TO THE PARISH OF OUACHITA, STATE OF LOUISIANA

BLEICH, Justice, dissenting.

The conviction in this case was legally supported by the record and the sound judgment of the trial court, particularly during the voir dire process. The majority opinion inappropriately emphasizes excerpts of the voir dire of two prospective jurors rather than the totality of their testimony. The majority does not give appropriate legal deference to the trial court's discretion. Therefore, I respectfully dissent.

The majority has held that in a capital case, a juror who would choose to recommend the death penalty rather than life imprisonment when no mitigating circumstances are presented must be disqualified. I do not believe that the prospective juror[1] Honea should have

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[1] It is noteworthy that neither of the two prospective jurors mentioned in this dissent actually served on the jury. Therefore, the jury that actually heard this case was fair and impartial. This writer would suggest that this point of the jury that actually served and its impartiality should be examined by this court in consideration of the rule set forth in *Ross v. Oklahoma*, 108 S.Ct. 2273 (1958), wherein the United Supreme Court stated: "So long as the jury that sits is impartial, the fact that the defendant had

been excused for cause. A careful examination of the testimony of prospective juror Pritchard leads to the same conclusion.[2]

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to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." (Emphasis supplied.) No "incompetent juror," as that term is defined in *Ross*, was forced upon this defendant. No substantial derogation of the defendant's rights would occur if the *Ross* rule is applied in this case.

[2] *Excerpts from the testimony of prospective juror Pritchard:*

Q. . . . Are you going to be able to say, "I will look at all the circumstances of the offense, any mitigating circumstances if there are any, see if the State proves their aggravating circumstances, consider the character and propensities"? Will you look at all of that?

By Mr. Pritchard: I think I can look at it, yeah. I may not agree with it, but I think I can look at it. R. 3385

. . .

Q. . . . And that you hoped you wouldn't go fishing for some reason to vote for first degree murder after you saw specific intent. Is that right?

By Mr. Pritchard: Yeah, that's right. Because one of the circumstances has to exist, the robbery or whatever that we was talking . . . I mean it has to exist. Either it does or it doesn't. And I hope I wouldn't go fishing to try to find something and to try to connect that to the first degree. R. 3386.

. . .

By Mr. Pritchard: I would do my best to follow the law . . .

Q. Do your best, but you're not certain that you would follow the law?

A juror should be dismissed based on mind-set and beliefs, first, if he "is not impartial, whatever the cause of his partiality." La. C.Cr.P. Art. 797(2). Second, a juror should be dismissed if he "will not accept the law as given to him by the court." La. C.Cr.P. Art. 797(4). The law relevant to capital sentencing mandates that "[a] sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed." La. C.Cr.P. Art. 905.3. However, in the hypothetical questions posed to these jurors, there were *no mitigating circumstances* to be

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By Mr. Pritchard: No, as I've said, I can't guarantee anything.

. . .

By The Court: . . . Now, you may personally disagree with the law, but it will be one of your duties as a juror to apply that law, the law of Louisiana as it exist today, regardless of your personal feelings about the law. Do you understand that, sir?

By Mr. Pritchard: Yes I do, Your Honor.

By The Court: And can you do that?

By Mr. Pritchard: I think I can, but what I was trying to get at was that I would not try to come up and . . . with one of the circumstances that would had to also exist, in the back of my mind say, "Well, maybe this over here really applies to this." R. 3387-3388.

. . .

considered.[3] The jurors were not refusing to abide by the law.

The majority cite *State v. Ross*, 623 So.2d 643 (La. 1993), and *State v. Robertson*, 92-2660 (La. 1/14/94); 630 So.2d 1278, for the proposition that challenges to jurors who would automatically vote for the death penalty if the defendant was convicted should be sustained. In those cases, the jurors said that they would refuse to regard the statutory requirement to consider any mitigating circumstances presented by the defense in making their determination. The situation presented in those cases is critically different from that presented by prospective jurors Hones and Pritchard. The jurors in the instant case would vote for the death penalty if mitigating factors were not presented by the defense. If mitigating factors were presented, they would garner these prospective jurors' due consideration.[4]

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[3] *Voir dire of Mrs. Hones:*

Q. What I'm asking you is, if you don't hear any reason from him why, or if you don't hear any kind of explanation, something to make it better, then you're going to impose the death penalty? Right? . . .

By Mrs. Hones: Yes. R. 3053-3054.

[4] *Voir dire of Mrs. Hones:*

By Mrs. Hones: Well, like I say, if something happened that they was defending themselves or maybe . . . I don't know, maybe had a good excuse . . .

Q. What . . . What I'm asking . . . Yes, ma'am.

By Mrs. Hones: I really don't believe in just taking a life for a life. I don't believe in that. R. 3052.

If there is at least one aggravating circumstance coupled with several mitigating factors, the death penalty is yet an option. *Sawyer v. Whitley*, 945 F.2d 812 (5th Cir. 1991), *aff'd*, 505 U.S. 333, 112 S.Ct. 2514, *reh'g denied*, 505 U.S. 1244, 113 S.Ct. 21 (1992). At the same time, the jury need not find mitigating circumstances to recommend a life sentence. *State v. Martin*, 550 So.2d 568 (La. 1989); *State v. Watson*, 449 So.2d 1321 (La. 1984). These cases give jurors permission to recommend a life sentence in their discretion; they do not mandate that the juror be disposed to this option. Beyond the statutory requirement that jurors find one aggravating circumstance before recommending death, and consider mitigating factors where presented, the penalty in a capital case is absolutely

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Voir dire of Mr. Pritchard:

Q. All right. . . . The second phase is the sentencing, and you consider the circumstances, the character, that kind of thing, aggravating circumstances, mitigating circumstances. Do you think just because you voted guilty at the first phase that you would automatically recommend the death penalty or would you consider anything and everything?

By Mr. Pritchard: I would hope I would consider the circumstances involved in it.

Q. And if you heard mitigating circumstances would you consider those?

. . .

By Mr. Pritchard: Yes. I think I would.

Q. Okay. And is there any reason why you would automatically recommend death just because you had voted guilty?

By Mr. Pritchard: No. There again I'd have to look at the circumstances involved in it. R. 3370-3371.

optional. The role of the jury is to recommend a penalty based on facts and impressions gained from hearing the trial of the case filtered through their personal dispositions and beliefs.

The trial court is accorded broad discretion in ruling on challenges for cause. *State v. Hallal*, 557 So.2d 1388, 1389 (La. 1990). A juror should be dismissed where "bias, prejudice or inability to render judgment according to law may be reasonably implied." *Id.* at 1390. This court does not give appropriate deference to the sound judgment of the trial court in making this determination. Assuming *arguendo* that some of the answers, viewed out of context, raise questions as to the validity of a challenge for cause, the trial judge was in the best position to hear and view the prospective jurors as their answers were given. One could debate the tenor of a written statement as it appears from a cold transcript, but the one who actually knows – who actually judges – the correct meaning and inference to be drawn from an answer is the trial judge. This experienced trial judge went to great lengths to preserve the integrity of the record and the right of the defendant to a fair trial and an orderly proceeding. The trial judge clearly answered any question that might have existed as to the viability of service of the prospective jurors.[5]

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[5] For example, before counsel ever raised an objection concerning the ruling on the challenge for cause of Pritchard, the trial judge dutifully noted a possible objection of the defendant for the record. R. 3407-3408. If the court's ruling had been so egregious or clearly wrong, surely counsel would have made such suggestion. This can only lead to the conclusion that the answers of Pritchard, when taken in context and in light of

Stark answers from the record often present multiple potential interpretations. The sound judgment of the experienced trial judge here resulted in the correct conclusions. Our constitutional provision granting the defendant the right to a fair trial does not mean the State of Louisiana and its citizens are not likewise entitled to that same fair trial.

I respectfully dissent.

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his demeanor as observed by the trial judge, show clearly that he would have followed the law and should not have been removed for cause.

SUPREME COURT OF LOUISIANA

No. 94-KA-0756

STATE OF LOUISIANA

Versus

JAMES E. DIVERS

ON APPLICATION FOR REHEARING

Bleich, J., dissenting from the denial of the motion for rehearing.

I disagree with the majority of this court in its denial of the State of Louisiana's request for a rehearing. The motion for rehearing should be granted.

As stated in my previously filed dissent, the conviction and sentence were proper. Therefore, a rehearing should be granted on this entire case including the previously issued reversal of the conviction and sentence. However, at the very least, this court should grant a rehearing as to the reversal of the conviction.

In the opinion filed by a majority of this court, the majority found that error had occurred during the jury selection process. The supposed errors, however, dealt only the testimony of prospective jurors as to their views on the death penalty. It was not alleged that these prospective jurors were otherwise unqualified to sit on the jury. Clearly, they could have fairly and impartially decided the issue of guilt or innocence.

If any part of this case should have been reversed, with which proposition I still disagree, it should have been limited only to that phase of the trial to which the error was pertinent. Reversing both the conviction and

penalty casts an undue and costly burden on the State of Louisiana to re-try a case which has already been validly decided. As stated in my previously filed dissent, the State of Louisiana was and is entitled to a fair trial, not just the defendant. In this case, the State of Louisiana has not been given a fair disposition of this case.

I strongly dissent.

SUPREME COURT OF LOUISIANA

FOR IMMEDIATE
NEWS RELEASE NEWS RELEASE #103

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the *11th day of October, 1996,* the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARINGS DENIED:

94-KA-0756 STATE OF LOUISIANA V. JAMES E. DIVERS (PARISH OF OUACHITA)
MARCUS, J. – not on panel
WATSON, J. – would grant a rehearing.
BLEICH, J. – dissents from denial of rehearing with reasons.

95-C-2610 SUCCESSION OF STELLA LESCALE VILLARRUBIA (Parish of Orleans)
CALOGERO, C.J. – would grant a rehearing.
WATSON, J. – would grant a rehearing.
LEMMON, J. – would grant a rehearing.

SUPREME COURT OF THE STATE OF LOUISIANA

STATE OF LOUISIANA

VERSUS NO. 94-KA-0756

JAMES E. DIVERS

FILED:_____ DEPUTY CLERK

APPLICATION FOR REHEARING

NOW INTO COURT, comes the State of Louisiana through the undersigned Assistant District Attorney, and respectfully applies for rehearing from the opinion rendered September 5, 1996 for the following reasons:

1.

Mover respectfully submits that this Honorable Court erred by reversing the Appellant's conviction and vacating his sentence based upon the voir dire process

2.

For the reasons set out in that attached Memorandum in support of this motion, it is clear that no constitutional right of the defendant to full use of his peremptory challenges was violated.

3.

It is error for this Honorable Court to reverse a first degree murder conviction for the reasons stated in the opinion of the Court dated September 5, 1996.

WHEREFORE, THE STATE OF LOUISIANA PRAYS that this Honorable Court grant a rehearing in the instant case, reconsider its opinion rendered September 5, 1996, and reverse its judgment.

Respectfully submitted:

/s/ Madeleine M. Slaughter
MADELEINE M. SLAUGHTER
ASSISTANT DISTRICT ATTORNEY
FOURTH JUDICIAL DISTRICT

CERTIFICATE

IT IS HEREBY CERTIFIED that a copy of the foregoing application was mailed, postage prepaid to Mr. R. Neal Walker, Attorney for Defendant, Loyola Post Conviction Defender Office, 210 Baronne Street, Suite 1343, New Orleans, LA 70112.

MONROE, LOUISIANA, on this 10 day of September, 1996.

/s/ Madeleine M. Slaughter
MADELEINE M. SLAUGHTER
ASSISTANT DISTRICT ATTORNEY
FOURTH JUDICIAL DISTRICT

MEMORANDUM IN SUPPORT OF STATE'S APPLICATION FOR REHEARING

INTRODUCTION

On July 26, 1991, James Divers was convicted of First Degree Murder and sentenced to death. On September 5, 1996, this Honorable Court reversed the conviction and

sentence on the basis of the erroneous denial of two challenges for cause by the defense.

After a review of the written opinion of the Supreme Court of the State of Louisiana, a re-review of the trial transcript of the voir dire and the related state and federal jurisprudence, it is the conclusion of this office that the reasons given for the reversal are not well grounded in fact or law.

The State respectfully urges this Court to re-examine this record and grant a rehearing on the issues raised in the opinion of September 5, 1996.

ARGUMENT

JUROR HONEA

Ms. Honea expressed no adamant or unswervable conviction for the death penalty. She was fully voir dired by the prosecutor (R.p. 3039 et seq.) concerning the law and the fact that the jury could not automatically impose the death penalty just because they had already voted guilty. (R.p. 3041). Ms. Honea was specifically asked:

> Q. And would you say, "Well, just because he's been convicted I think he automatically ought to get death", or would you say, "No, I can agree with the law that just because he's been convicted of first degree murder he doesn't automatically get death. I have to hear aggravating circumstances. . . . "
>
> A. By Ms. Honea: Yes.

Ms. Honea was confused (R.p. 3050) about defenses to murder and also about what she'd do as to the penalty

for a killing if "they specifically intended it . . . " (R.p. 3051) to which she indicated " . . . I guess that's what I'd do." (impose the death penalty) but when further asked by defense counsel (R.p. 3051) "would you . . . would you even consider giving somebody a life sentence, a sentence of life imprisonment if you . . . " her reply was "Well like . . . like you say you come back over on this side and you go through other . . . other deal . . . other things, then maybe. . . . " A juror which defense counsel found acceptable on the same panel as Ms. Honea was Kandi Shaw Pate. Ms. Pate had stated (R.p. 3048) that if she had already voted guilty and did not hear any mitigating circumstances from the defendant that she would impose the death penalty, her answer (R.p. 3048) "Death penalty more than likely." Ms. Honea later (as Ms. Pate did) indicated that if she heard no mitigating evidence then "Well, I would still be the same if I didn't hear nothing different . . . I'd still say capital punishment." (R.p. 3051).

Lack of clarity in a juror's answers is not the test. *Wainwright v. Witt*, 469 U.S. 412, 423; 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). The juror attempted to explain what she'd consider mitigating (R.p. 3052) and stated "I really don't believe in just taking a life for a life. I don't believe in that." Defense counsel persisted with this juror until he got the answer he wanted (R.p. 3054), "No, I wouldn't consider life." but that incorrect answer (see *State v. Lee*, 559 So.2d 1310, 1318 (La. 1990) cannot be isolated out of all her other answers.

It is obvious from the entire voir dire of this panel, as the prosecutor noted in several objections, that these jurors were seriously badgered by defense counsel and their answers that they were not sure what they would do

were not accepted by defense counsel who instead re-asked the same question (see exchange at R.pp. 3056 and 3057 with Juror Grafton) whereupon the judge ordered Article 905.3 read to the jury panel. They all agreed they could follow this law. The defense then offered a challenge for cause on Ms. Honea (R.p. 3060) which was denied.

Ms. Honea later stated (R.p. 3071) that she could vote not guilty if the state didn't prove its case. Ms. Honea's voir dire must be looked at in its entirety.

JUROR PRITCHARD

On this panel were four jurors, Cheryl Williams Newton, Norman Dean, Mickey Murphy and Michael Pritchard. Both Newton and Dean were excused on defense challenges for cause on venire issues.

Mr. Pritchard was examined on the death penalty issue beginning on p. 3370. He is very *clear* that he would not automatically vote for the death penalty (See R.p. 3370 – line 6 through p. 3371 line 5). Mr. Pritchard expressed an opinion that all murders with specific intent to kill ought to be first degree murder, i.e., possible death sentence. The Court states in its opinion that this is the "fundamental problem with Pritchard." It is not grounds for a challenge for cause that the juror disagrees with the law if he indicates he'll be able to set his opinion aside and accept the law as given to him by the court. *State v. Lee*, supra. In its opinion on September 5th, the Court notes that when asked if he would be able to leave his personal views aside, he " . . . Pritchard expressed doubt that he would be able to do so." This was in response to a

question about whether "the death penalty should be involved as a possibility" (R.p. 3374). This juror was not expressing an opinion on how he would vote in the penalty phase of a first degree murder conviction but expressing his opinion on the **irrelevant** issue of whether the death penalty should be available in all cases where there was specific intent to kill and not just those specific instances enumerated in the first degree murder statute.

The defense examination of Mr. Pritchard's opinion about any automatic penalty began with his voir dire on p. 3375. Pritchard tells defense counsel (at p. 3376) that " . . . I mean I'd like to say that I would ignore it, my feelings about it, but I couldn't tell you that." Pritchard indicates (at p. 3376) that he **thinks** once he voted guilty of first degree murder then his decision in the second part (penalty) would be made for him. In an attempt to clear up any confusion about Mr. Pritchard's equivocal answers – that he'd **like** to say he could ignore his feelings and **he thinks** his decision would be made for him on the penalty, Mr. Pritchard was re-voir dired by the State, beginning at p. 3380 wherein the difference between first degree murder and second degree murder was explained and he was specifically asked (R.p. 3383) "Now, even though you don't agree with that statute, can you accept that that's what the law is? That first degree statute, that's what the law is at this time?" To which he responds "I can accept what it is." He is then asked (R.p. 3384) if he would automatically vote for the death penalty because he voted guilty of first degree murder or would he be able to consider the option. His answer "Well, I hope I would. I hope I would not go fishing for some excuse to come up with first degree." The juror indicates

that he has an opinion that premeditated murder should carry the death penalty (R.p. 3384) but "I think I can look at it, yeah. I may not agree with it, but I think I can look at it." (i.e. can look at mitigating circumstances). At p. 3387, he states he'd do his best to follow the law but he can't guarantee anything.

The court then examined Mr. Pritchard (R.p. 3387) after which he stated that he understood that his duty as a juror would be to apply the law regardless of his personal feelings about the law. Mr. Pritchard explains that "I don't know if I making myself. . . . " (clear) to which the Court responds that he is. This the crux of the issue – that the judge understood the juror's statements given within an entire context of his voir dire and his statements did not indicate an unwillingness to follow the law or an intent to automatically impose the death penalty.

CASE LAW

In *State v. Lee*, 559 So.2d 1310, 1318 (La. 1990) Justice Calogero succinctly stated the test to be followed in assessing whether to grant a challenge for cause, the test of looking at the juror's responses during her entire testimony. The operative words are **look** and **entire**. Only Judge Michael Ingram looked at these two jurors in a neutral manner. It is very clear from this record that Judge Ingram was extremely generous to the defense on all their requested challenges for cause; he in fact granted 22 to the defense over a period of six full days of voir dire.

In *State v. Maxie*, 653 So.2d 526, 534 (La. 1995), Juror Rains exhibited a "predisposition to **automatically** impose the death penalty in the event that the defendant was found guilty at the guilt phase of the trial." (emphasis supplied). This juror clearly stated she was predisposed to imposing the death penalty and her mind was not open to both the death penalty and life imprisonment and the death penalty should be imposed once the defendant's guilt was established. That was a clearly adamant juror.

In *State v. Robertson*, 630 So.2d 1278, 1281 (La. 1994), the Court stated that at issue in the case was " . . . a challenge for cause based on a potential juror's **apparent** predisposition to **automatically** impose the death penalty, regardless of any evidence that might be developed at the trial or the sentencing hearing, and regardless of the fact the law requires a juror to consider mitigating circumstances in the sentencing phase." (Emphasis supplied). The offending juror was a Mr. Payne. He clearly stated he would not be able to consider a life sentence (where two people were killed, as the facts would develop in the case). Payne later stated once Robertson was convicted of both counts of first degree murder he would **automatically** vote for the death penalty without regard to evidence in mitigation.

In *State v. Ross*, 623 So.2d 643 (La. 1993), Juror Davis responded to voir dire on the death penalty but stated that for him the death penalty would be the **only penalty** for first degree murder and although he could consider both penalties, personally his vote would be for the death penalty.

All of these cited cases: *Lee, Maxie, Robertson* and *Ross,* provide guidelines to the trial judge, prosecution and the defense which are not impossible to follow, but this decision overturning Divers' conviction incorrectly applies this jurisprudential interpretation of our Louisiana Constitution's guarantee of a full twelve peremptory challenges to the defense. The denials of the challenges for cause on these two jurors were sound because they both indicated an ability and willingness to follow the law and no adamant predispositions. Voir dire to these jurors was very confusing but they never exhibited grounds for challenge for cause.

ISSUE OF PREJUDICE

Yes the defense used all twelve of its peremptory challenges, and why not when the exhaustion factor provides them a presumption of prejudice. It is very apparent that the perempt of Mr. Murphy, the very next juror after Mr. Pritchard, was nothing more nor less than trial tactics because his answers on voir dire were extremely neutral. With the twelfth perempt of Mr. Murphy however, the presumption was a given.

Is the presumption of prejudice an irrebutable presumption? Does the fact that the defense after exhausting twelve challenges had no challenges left to cut the twelfth juror selected, one Earlean Bass, a black female, demonstrate the effects of this prejudice? Did the defense perempt only white jurors – yes. Did this exhaustion result in the selection of a twelfth juror of the profile that the defense exhibited a preference for – black female? Yes.

On this last panel, #20, from which Ms. Bass was selected, she was the last juror left of the four originally on the panel after the other three jurors were excused either on cause challenges by the defense, Whitlock (w/f) and Lawson (w/m) or the court, Wanda Franks (w/f).

It is noteworthy on this issue of prejudice, that the defense had absolutely no problem with Ms. Earlene Bass although the defense attorney offered a challenge for cause on the entire panel (R.p. 3491) based on remarks made by Mr. Lawson. So where's the prejudice to the defense, they got **stuck** with just the type of juror they wanted and in a case where each vote counted, unanimous at both stages. This is the issue, what happens when your perempts are exhausted not just that they are exhausted.

CONCLUSION

Jury selection is presided over by a trial judge charged with the duty of insuring a fair process, the numbers may not be the only indication of whether or not this process was fair.

Respectfully submitted:

/s/ Madeleine M. Slaughter
MADELEINE M. SLAUGHTER
ASSISTANT DISTRICT ATTORNEY
FOURTH JUDICIAL DISTRICT

CERTIFICATE

IT IS HEREBY CERTIFIED that a copy of the foregoing application was mailed, postage prepaid to Mr. R.

Neal Walker, Attorney for Defendant, Loyola Post Conviction Defender Office, 210 Baronne Street, Suite 1343, New Orleans, LA 70112.

MONROE, LOUISIANA, on this 10th day of September, 1996.

/s/ Madeleine M. Slaughter
MADELEINE M. SLAUGHTER
ASSISTANT DISTRICT ATTORNEY
FOURTH JUDICIAL DISTRICT

SUPREME COURT

STATE OF LOUISIANA

****

NO. 94-KA-0756

****

STATE OF LOUISIANA

Appellee

versus

JAMES E. DIVERS

Appellant

****

ORIGINAL BRIEF ON BEHALF OF THE STATE OF LOUISIANA

****

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STATEMENT OF THE CASE

At approximately 12:15 p.m. on April 12, 1988, two young ladies were walking down a gravel road approximately one-fourth mile north of the Moon Lake Recreational area in Ouachita Parish, when they noticed two bodies lying in a wooded area about thirty feet off the roadway. The young ladies notified two fishermen who went to investigate. The young ladies notified authorities.

One of the victims was found to be alive. He was later identified as Simmie J. Stevenson, black male. First aid was administered. The other victim was later identified as Winston L. Vandervield, black male. Both victims were bound with their hands behind their backs. Their feet were also bound. They were gagged with men's neckties. Stevenson was also bound with a white electrical cord. Vandervield was fully dressed, though his pants and underwear were pulled around his knees. Both victims had been shot in the head. Vandervield was dead at the scene. Stevenson was transported to a local hospital but died that same day. Vandervield was last seen alive,

by his sister, on April 11, 1988. His employer told deputies that he was last at work on April 11, 1988, though absent from work on April 12, 1988.

Stevenson's house was later searched; however, there were no signs of foul play. Stevenson's vehicle, a 1983 Chevrolet Monte Carlo, was located on Solvent Street in Sterlington, Louisiana. The vehicle was secured and subsequently searched. Blood was found in the trunk. Pillows were also located in the trunk. A blood specimen was taken from the spare tire in the trunk and a specimen was taken from the floor of the trunk. Other vacuumings and articles were removed from the car.

A search warrant and consent for search were obtained for Vandervield's home located at 1403 Mississippi Street, Monroe, Louisiana. The initial search revealed that the home was in disarray.

A trash can partially blocked the doorway to the living room and kitchen area. A microwave oven and clothes iron were on the floor. A vacuum cleaner was found on the living room floor. The vacuum cord had been cut and only about eight inches remained attached to the vacuum. The cord was the same type found bound to Stevenson's body.

Blood was located on the floor next to the bed. There were pillows on the floor next to the blood stains. The bedroom was in disarray, as it appeared that the dressers had been "rifled" through and pulled out.

The only dining room chair was found inside the bedroom closet and it appeared to have been used to view the contents of the top shelf. A white moist towel

was found on the bed. A search was made for Vandevield's 1988 white Dodge Shadow; however, it was not immediately recovered. Nationwide messages concerning the vehicle identification and its possible connection to two murders were sent out via the NCIC computer.

On May 3, 1988, the vehicle was located by the Dallas, Texas police. Detective Howard Antrobus of Dallas notified Lt. Royce Toney of the Ouachita Parish Sheriff's Office that the vehicle had been discovered by a Dallas Officer Phillip Murray. The vehicle was backed into a parking space at the rear of an apartment complex. The vehicle was bearing a Texas plate on the rear. The plate had been stolen on April 22, 1988. The vehicle was seized and subsequently searched.

On May 4, 1988, Lt. Royce Toney and Deputy Billy Myers went to Dallas. They learned from Dallas authorities that a black male named James was alleged to have been driving the car. A physical description of the black male was obtained. He was seen peeping out of the window at 2902 Cleveland Street, Apartment number 206, Dallas, Texas.

The officers went to that location and knocked on the door. No one answered the knock. They contacted the manager who advised them that the apartment was rented to a Sharon Felder. The manager had not seen Felder for some time and she was afraid for Felder. The manager told the officers that a man named James, who was wanted for murder in Louisiana, was staying in the apartment. The officers asked for a pass key to check on Felder; however, the manger did not have one. The officers, accompanied by the manager, discovered an

unlocked window. They opened the window, reached in, and unlocked the door.

Inside the apartment, the officers located a black female, identified as Annie Lee Benton, in a bedroom. She denied that a man named James was in the apartment. The officers, armed with the information that James was there, continued their search.

The officers located a closet which had chairs stacked in front of it. When they reached for the door, the door fell. Inside the closet, the officers located a black male fitting the description they had received. He identified himself as Jessie Divers. He was taken to the Dallas Police Department. It was later learned that Jesse Divers was the man's brother. The man's real name was James. He finally admitted as much.

Divers advised the police that he obtained the Dodge Shadow from two black male drug users after trading drugs for it. Divers was subsequently booked into the Dallas County jail for unauthorized use of a motor vehicle.

Felder later gave a statement to the police. She stated that Divers moved into her apartment on March 28, 1988. He left Dallas on April 4, 5, or 6 and returned to Dallas on April 12, 1988, the same day the bodies were discovered. He was driving the Dodge Shadow. He told Felder that he had gotten the vehicle from two homosexuals, but later told her that he had gotten the vehicle from his uncle.

Divers later waived extradition and was returned to Ouachita Parish on July 15, 1988. The Ouachita Parish District Attorney obtained, on July 6, 1988, an indictment

for the murders after receiving information from Divers' cousin, Everette English, that Divers had killed the victims.

Authorities later learned that Divers had admitted to another inmate while in the Dallas jail that Divers had killed two men. The inmate's name was Joel Thompkins. Even later, it was learned that Divers also admitted to one Donald Elledge, a Ouachita Parish inmate, that he had killed the two men.

The evidence seized from 1403 Mississippi Street, was analyzed by authorities. Divers' fingerprints were found on beer cans and bottles seized from inside Vandervield's home. A shoe print which matched Divers' shoes, was located in Vandervield's carport. Diver's denied ever being in Vandervield's home.

English, Divers' cousin refused to testify against Divers, although English had previously been tried.

Divers was subsequently tried and found guilty as charged of two counts of first degree murder. A unanimous jury determined that Divers should be sentenced to death. He was so sentenced.

This appeal followed.

A. JURY ISSUES

I. CHANGE OF VENUE

The trial judge reviewed the documents submitted on the Motion for Change of Venue (R.p. 2817) and at the end of the selection of the twelve jurors denied the motion. (R.p. 3492).

The murders took place on April 11 and April 12, 1988. The trial began on July 15, 1991. Jury selection was completed on Saturday, July 20, 1991 (except for the alternates) after examination of 84 jurors with the Court having granted 53 challenges for cause and the defense having exercised 12 peremptory challenges and the State 7.

The trial judge considered the defense motion for individual voir dire which he stated he granted in part (R.p. 2073) by ordering the jurors to be examined in groups of 4. The Court stated that it based its ruling on *State v. Wilson*, 467 So.2d 503 (La. 1985), *State v. Comeaux*, 514 So.2d 84 (La. 1987), and *State v. Copeland*, 530 So.2d 527 (La. 1988). The defense did not thereafter reurge the motion except in panel #11 with prospective juror, Marsha Hogard who indicated she'd heard something negative from one of Divers' relatives. The other three jurors were removed before she revealed what she had heard. When questioning prospective juror, Karen McMorris (in panel #3) who stated that her cousin-in-law was English's trial attorney, defense counsel did not request that she be individually voir dired.

In *Comeaux*, supra, the voir dire was ultimately conducted in panels of six or fewer. The Court (at p. 88) stated that:

> "There is no provision in our law which either prohibits or requires the sequestration of prospective jurors for an individual voir dire. . . . A trial court has the discretion to permit individual voir dire if a defendant can demonstrate that special circumstances are present. La.Code Crim. P. Art. 3; *State v. Lindsey*, 404 So.2d 466

> (La. 1981). Absent special circumstances, the trial court does not err in refusing requests for individual voir dire. The fact that defendant's case is capital does not by virtue of that fact alone establish a "special circumstance" requiring a variation from the general rule of trial court discretion. *State v. Wingo*, 457 So.2d 1159 (La. 1984), cert. denied, 471 U.S. 1030, 105 S.Ct. 2049, 85 L.Ed.2d 322 (1985).

In this case, the Court was extremely liberal with the challenges for cause, granting 24 to the State, 22 to the defense, and 7 on its own motion. Among the 12 jurors who sat on the case, note the following:

> **#1 Candy Clampit** – (R.p. 2085) Did not read the paper or watch the news and basically had no opinion about the case.
>
> **#2 Kathy Cox** – (R.p. 2387) Although she saw it on the news (TV) and newspaper, remembered very few details, saw nothing on case in 1991 and (R.p. 2390) had no impression whether the defendant was guilty or not guilty.
>
> **#3 Marilyn Robinson** – (R.p. 2436) Had read something in the paper in 1988, she'd read or remembered nothing in the last 6 months. She remembered a possibility of some homosexuality. She stated (R.p. 2438) that she had developed no opinion about the case.
>
> **#4 Gina Price** – (Panel #12) (R.p. 2752) stated that she only remembered something about somebody being found dead and had no knowledge of who was arrested. She had not heard a thing since the first of the year. She stated (R.p. 2754) that she heard talk in the jury that they might have been homosexual but that had not

influenced her because she didn't even know who they were talking about.

#5 Kelly Bethke – stated (R.p. 2843) that all she heard was that some bodies were found at Moon Lake and she heard about one person being arrested. She had no impression about the case or the person arrested because (R.p. 2845) "I don't necessarily think that the person, whoever they arrested is automatically guilty."

#6 Dorothy Christian – (R.p. 2850) had seen case on TV news in 1988 and remembered that they found two bodies and were looking for the killer. She thought the first person arrested was sentenced. This year (91) after she got her summons (R.p. 2853) she started looking through the paper but didn't see anything about case other than jury selection.

#7 Kay Ellis – (R.p. 3090) remembered hearing the case on the TV and radio back in 88. Somebody at work had discussed case. She had no impression of the case.

#8 Allen Haynter – (R.p. 3094) vaguely remembers hearing the name Moon Lake. He did not follow previous court proceeding. He discussed how many jurors had been chosen before he got to court. He really had no impression because what's said in the papers is not always as it is.

#9 Cynthia Bonner – (R.p. 3108) remembered hearing in 1988 that they found 2 people bound and shot at Moon Lake but did not remember anything else. She didn't really remember reading anything this year and had no impression of the case.

#10 Josh Hollis – (R.p. 3100) was a gentleman 79 years of age. In 1988, he saw it in the paper

that two bodies were shot, one dead. He read other articles but never paid any attention to it. He did not know about any court proceedings. He had no impression or opinion about the case.

#11 Marsha Johnson – (R.p. 3274) heard on TV in 1988 that 2 people or one was murdered. She knew English had been arrested because her son went to school with him but she did not know what happened to English in court. She's not heard anything in the last 3 or 4 months and had no opinion of the case. She stated (R.p. 3296) that what the other jurors discussed had not affected her.

#12 Earlean Bass – (R.p. 3420) back in 1988 she read it in the papers and wondered why he came all the way from Texas to kill those people. She remembered several details but followed no court proceedings but she thought (R.p. 3422) Divers had been tried and sentenced. She had no opinion about the case. She stated (R.p. 3427) "Right now I don't know if he done it or who. At p. 3491, the defense offered a challenge for cause on the entire panel this juror sat on based on prospective juror #83 Michael Lawson's comment in front of the panel. Lawson was excused on a defense challenge for cause because he had the impression (R.p. 3430) that he was the trigger man in the murder and was guilty.

There was no necessity for individual voir dire established by the defense under *Comeaux*, supra. The one time the defense asked for it, they got it – Juror Hogard.

There was also no basis for a change of venue. As in *State v. Willie*, 410 So.2d 1019 (La. 1982) very few jurors had an opinion as to the defendant's guilt or innocence,

the great bulk of the pretrial publicity consisted of straight news reporting, the trial was not attended by other inflammatory factors such as racial strife, the defendant and the victims were of the same race, and there was no egregious event such as a televised confession (although English's confession got some play, one juror remembered that). As in *Comeaux*, there was no showing by the defense that the media coverage was inflammatory.

II. ERRONEOUS FAILURE TO EXCUSE FIFTEEN PROSPECTIVE JURORS

The only meat in this argument is found in the allegation that four cause challenged jurors actually served on the jury.

The defendant argues that Gina Price, Juror #4, was exposed to comments about homosexuality. The defense offered no challenges for cause on this juror (R.p. 2766) evidently because she followed her remark with the modifier (R.p. 2755) that the remark did not cause her to have any feeling or impressions because "I don't even know who they were talking about."

The defense did offer a challenge for cause to the entire panel that Juror #12, Earlean Bass, sat on but Ms. Bass indicated that she had no opinion. There was no showing whatsoever that any remarks by prospective juror, Lawson, had any effect on her opinion. No individual challenge for cause was offered on Bass by the defense. On Ms. Bass' panel, panel #20, Gracia Whitlock had been excused on an individual challenge for cause by

the defense (R.p. 3450); i.e. the judge was still liberally granting challenges for cause.

There was no challenge for cause on Juror #10, Josh Hollis, despite the defendant's contention at page 67 of their brief that there was. There were none for jurors #9 Cynthia Bonner and #8 Kay Ellis. There were no bases for a challenge for cause by the defense on these three jurors.

The defense complains of the fact that they had to use 12 perempts because the court denied their challenges for cause. The defense used its 12th challenge of cause on Mickey Murphy, prospective juror # 78 (R.p. 3406). This prospective juror gave very neutral answers. At (R.p. 3378), he stated he would consider the life penalty option even if he had already voted guilty. To the question if there were 5 aggravating circumstances and no mitigating circumstances would you consider life, he answered (R.p. 3379), "I really can't say." It may have just been tactics that led to the perempt on this juror because there were no grounds for a challenge for cause.

III. A DOUBLE STANDARD WHICH FAVORED THE STATE

The challenges for cause came at three points. First the jurors were examined as to venue issues, defense first and then the State. If the jurors survived that phase, they went to questions on the death penalty, with the State going first and then the Defense. Many jurors expressed absolute opposition to the death penalty and would not be rehabilitated by either the Defense or the Court, such as: 1) Carl Robinson, black male, (the Court also questioned him); 2) Willie Hardwell, black male; 3) Roseanne

Marks, white female; 4) Veronica Harris, black female; 5) Tommie Thomas, black male; 6) Michael Swinson, black male; 7) Constance Ellis, black female; 8) Larry Barnes, white male; 9) Mrs. Walter Larose, white female; 10) Marya Smelser, white female; 11) Benny Johnson, white male; 12) Reitha Lee, white female; 13) James Balfour, white male; 14) Eula Francis, black female; 15) Donald Musick, white male; 16) Nancy Hon, white female; 17) Henry Drumgo, black male; 18) William Nelson, black male; 19) Claudene Moore, black female; 20) Wilbur Varner, black male; 21) John Wheatley, black male; 22) Laura Williams, black female; 23) Clifford Hunt, white male; 24) Bennie Owens, black female (Defense tried for 8 pages, beginning on 3245 to rehabilitate her) (Court examines her) and 25) Gracie Walker, black female (Court examines her). (15 blacks and 10 whites).

The jurors who survived the venue and death penalty voir dire then were questioned in a general voir dire.

Since 25 jurors expressed strong opposition to the death penalty, a challenge for cause that only the State could make, it appears that the State received more generous treatment, however an examination of the voir dire of these 25 jurors indicates valid grounds for each challenge.

Often the Court excused a juror after they had been voir dired on both issues and red flags were raised at each stage. For example the Court states at p. 2144 that he is excusing Robinson because of his relations and because of his answers on the death penalty. See also Kathleen Goss (R.p. 2476), Mrs. Walter LaRose, (R.p. 2476).

The defense argues that the trial judge intervened to rehabilitate jurors, to wit: Bazar, Prithchard, Pate and Honea. All were defense peremptory challenges. Actually, the trial court examined other persons too: See Robinson, Cole, Owens, and Walker.

It is plain that the Court examined jurors to aid its decision on challenges. This defendant cites *State v. Searles*, 94-0190 (La. App. 4 ir. 1994), 647 So.2d 1329, writ den. 654 So.2d 1352 (1995) in support of its contention of a pattern of the trial court's bias. In *Searles*, the judge refused to allow examination of the jurors personal background. The Court in *Searles* states (at p. 1332) "the defendant's right (to a full voir dire) may not be curtailed by the exclusion of non-repetitious voir dire questions which reasonably explore the juror's potential prejudices, predisposition, or misunderstanding relevant to the central issue of the case. (*State v. Anear*, 508 So.2d 943, 948 (La. App. 4th Cir. 1987)." Not so. This voir dire, when viewed as a whole, strictly complies with *State v. Hall*, 616 So.2d 664 (La. 1993) and its progeny.

IV. PROSECUTION'S USE OF ITS PEREMPTORY CHALLENGES

The State exercised seven peremptory challenges. They were as follows:

> **Edna Rogers**, a white female. Her views on the death penalty were (R.p. 2178) She thinks it's acceptable in certain instances but it would be rare (R.p. 2180). Q. Do you have any scruples against it, although I understand you think it is serious and everybody thinks it's serious. A. Uh huh (yes). (R.p. 2200) fact that police didn't

catch burglars of her motor home and business caused her a problem at the time.

Ira Cole, a black female. (R.p. 2193). The State offered a challenge for cause on her first because of her views on death penalty. At page 2182 and 2184, she would *never* vote for the death penalty. (R.p. 2185 and 2186) She would hold the state to a higher burden than beyond a reasonable doubt. (R.p. 2187) She told the defense attorney that "no circumstances I could vote for the death penalty at this time." The Court however, (R.p. 2187) got her to agree that "if the evidence justified it" she could in that limited circumstance vote to impose it. This juror should have been excused for cause.

Christopher Chaplin, a white male. (R.p. 2700) — He's been a referee; (R.p. 2716) The State has got to prove their case . . . and I wouldn't want that on my conscience or anything that I made a mistake or anything.

Vadie Burchell, a white female. (R.p. 2757) She volunteers that she doesn't believe in capital punishment. "I think they should have life." and she tells defense counsel " . . . I just don't believe in capital punishment." She later says she could consider death penalty so court denies challenges for cause.

Etta Hampton, a black female. (R.p. 2932) She felt sorry for all ones that did the killing and the ones that got killed. (R.p. 2958) Q. Could you consider the death penalty. A. "I couldn't say. (R.p. 2961) I don't think you should judge another person unless you know . . . Really know what you're judging him for. (R.p. 2967). She wanted 100 percent proof.

Lavelle Wilson, a black male. (R.p. 2970) He would not accept law on principals as being equally guilty. (R.p. 2995) He wanted 100 percent on evidence to be sure.

Kandie Shaw Pate, a white female. (R.p. 3035) When questioned about reasonable doubt, she answered, "For me to say to take his life, I would have to be, you know, no question in my mind whatsoever." In discussion of circumstantial evidence (R.p. 3038) when asked what if "there's some slight room for doubt," she answered, "then I would say give him life.

The defense exercised twelve peremptory challenges on: Thomas Harris, a white male; Kenneth Greer, a white male; Michael O'Neal, a white male, no cause offered; Marilyn Taylor, a white female, no cause offered; James Bazar, a white male; Phyllis Wasser, a white female; Minnie Dray, a white female; Anthony Variso, a white male; Marie Honea, a white female; Crystal Grafton, a white female, no challenges for cause offered; Michael Pritchard, a white male; and Michael Murphy, a white male. Only the defense cut member of one race exclusively.

The defendant argues that the prosecutor struck every qualified black prospective juror until eleven jurors were seated. Not so. Some of these qualified jurors were defense challenged, who the Court then excused: Cedrick Hemphill (R.p. 2098), Sammie Gray (R.p. 2193); and Lottie Parm (R.p. 2372). The Court also excused some black jurors for health reasons or due to lack of general qualifications: Sam Standley, could not hear and; Lucious Owens, could not read.

The defense raised Batson objections at several stages during the trial which the Court denied. The defense argument on *Batson* is spurious at best. According to the defendant, because the State used its first peremptory to strike a black juror, Ira Cole, a prima facie cause of race based exclusion was established, for which proposition the defense cites: *State v. Collier*, 553 So.2d 815 (La. 1989), *State v. Hamilton*, 594 So.2d 1376 (La. App. 2d Cir. 1992); *State v. Powell*, 598 So.2d 454 (La. App. 2d Cir. 1992).

The State cited the Court to *Collier*, supra, at p. 3000 of the transcript when the Batson challenge was made to Mr. Wilson's peremptory strike. In *Collier*, the prosecutor excused 5 black prospective jurors when the defendant raised a *Batson* objection. The prosecutor offered racially neutral reasons and voir dire continued. The prosecutor cut two more black prospective jurors and the defense raised a second objection. The prosecutor again offered racially neutral reasons and voir dire continued. The prosecutor then cut an eighth black prospective juror to which the defendant objected. Racially neutral reasons were offered and voir dire continued. Two black jurors ultimately sat on the jury but all of the State's eight peremptory challenges had been of black prospective jurors. The Supreme Court reversed and stated (at p. 818) "To provide better guidance for the trial courts of the state we will review in more detail the required standards established by *Batson* and will apply these standards to the facts of this case." The Court refers to peremptory challenges, a pattern of strikes and does later refer to the fact that although two black jurors sat on the jury, their mere presence does not defeat a *Batson* claim.

In *Hamilton*, supra, the Court found that there had been no prima facie case of discrimination because although all eight of the State's peremptory challenges were against black jurors, ultimately four black jurors sat on the jury.

In *Powell*, supra, a case on which this Assistant District Attorney was the prosecutor, three of the six jurors peremptorily excused were black. The appellate court examined the reasons offered on the challenge of each juror and found each to be racially neutral.

The defendant cites the rule that the state's peremptory challenges may not be based solely upon the potential juror's race. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986); La. Code of Crim. P. Art. 795(C). The state acknowledges this rule, but cites *Purkett v. Elem*, ___ U.S. ___, 115 S.Ct. 1769 (1995) for its discussion of *Batson* challenges. Under *Purkett*, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination, the burden shifts to the proponent of the challenge to give a race neutral explanation. Once such an explanation is tendered, the trial court must then decide whether the opponent of the peremptory challenge has proven purposeful racial discrimination. Under *Purkett*, the reason will be deemed race-neutral, unless the explanation has an inherently discriminatory intent. *Purkett*, 115 S.Ct. at 1771.

The Court in this case noted defense counsel's objections to the peremptory strike of Juror Ira Cole but required no reasons from the State evidently because it was the first peremptory challenge and therefore there could be no pattern. An examination of the record clearly

establishes that the prosecutor peremptorily struck *every* juror who expressed serious opposition to the death penalty and was not excused for cause by the court – Edna Rogers, white female; Ira Cole, black female; Vadie Burchell, white female; and Etta Hampton, black female. The prosecutor excused two other jurors as well who wanted the state to prove their case to a higher burden than beyond a reasonable doubt, i.e. Chaplin, a white male and Wilson, a black male. Kandi Shaw Pate, white female, was evidently not challenged for cause by the State due to her opinions but she was peremptorily excused by the State. An examination of Ms. Pate's remarks indicate (R.p. 3035) that she would want to be very certain before she'd recommend the death penalty and (R.p. 3038) if she had some slight doubt, "then I would give him life . . . ". There were no suspect strikes under *Batson* and certainly no pattern of exclusion due to race.

The defense challenges the strike of Lavelle Wilson alleging that the trial court merely accepted the State's reasons offered on Wilson because they were racially neutral on their face. It is submitted that this trial judge was *present* throughout the examination of all jurors including Ms. Wilson and engaged in more than an "uncritical acceptance of the state's asserted justifications" and did not "default on its duty to scrutinize the prosecutor's justifications." The pertinent part of Mr. Wilson's voir dire:

Q. Now when you say you want to be certain what do you mean?

A. A hundred percent to be sure.

Q. You want to be a hundred percent certain?

A. It's that sure.

(R.p. 2995).

In the discussion of principals:

Q. You understand that all three are equally guilty?

A. Yes they are . . . three of them are equally guilty, but one should be charged higher than the other because he's the one actually did the shooting.

Q. Okay.

A. The one who went into the store.

Q. Okay.

A. The guys out there in the car, they just had . . . they are with him . . .

Q. Uh huh.

A. But they didn't actually do it.

Q. . . . And suppose Joe, not being too smart or whatever, says, okay, and he goes in, but the other two really put him up to it, and they all share the money? Do you think they are equally guilty at that point?

A. No. They didn't do . . . they didn't actually do the killing.

Q. Okay.

A. Didn't actually pull the trigger.

(Please note that there was no question of a shooting). He is then questioned what if the other two in the car tell him to shoot the guy and asked:

Q. Do you think they're all equally guilty.

A. No. They didn't actually do the shooting.

He later states (R.p. 2973) he would follow the judge's instructions. (R.p. 2973) On the issue of doubt he states he wants "no doubt". (R.p. 2973) He's asked if he's witnessed arrests to which he answers yes. He's then asked:

Q. How do you feel about those scenes you've witnessed?

A. Well in certain cases they could handle it a little bit better.

Q. Uh huh. Okay. Did you ever see a situation where you thought the police were being a little overboard?

A. No.

Q. What do you mean they could have handled it better?

A. Well, wouldn't be so much trying to put words in a person's mouth, or trying to tell him that, "Yes, you did it", or trying to assure him that he's . . . he had really actually did this here. So, I think they can have it a little bit better than that, you know? Just out right, take the man to jail and, you know, he might not be drunk or anything and might not have stolen anything. But, you know, I have seen it happen.

Q. You've seen them when they've kind of intimidated people.

A. Yes.

Under *Collins*, supra and *Batson*, supra, the State had ample racially neutral, non-pretextual, legitimate and logical reasons to strike this juror.

It must be noted that the voir dire was conducted in three stages, on venue and if the juror gave no reason for a strike for cause then on the death penalty and if the juror gave no reason for a strike then on general questions. So one must look at jurors who survived the first two voir dire's as did Mr. Wilson on the totality of their voir dire.

The defendant states (R.p. 78) that the prosecutor asked no white jurors similar questions. To be questioned beyond venue and death penalty, they had to survive with no challenges for cause. O'Neal was questioned on circumstantial evidence (R.p. 2299) and again on R. page 2320. He's questioned on witness credibility (R.p. 2323). He's questioned on plea bargains between co-defendants (R.p. 2323). He's questioned on principals (R.p. 2324).

Juror Cox was voir dired on circumstantial evidence (R.p. 2425), arrests (R.p. 2425), witness credibility (R.p. 2426), principals (R.p. 2426), and plea bargains (R.p. 2427).

Juror Robinson was voir dired on circumstantial evidence (R.p. 2477), principals (R.p. 2478) and weapons (R.p. 2479).

Prospective jurors Day and Wasser – general voir dire (R.p. 2603 et. seq.) on circumstantial evidence p. 2608 principals, p. 2610 intent.

Jurors Bethke and Christian, general voir dire, p. 2892 et. Seq; (R.p. 2892) circumstantial evidence; (R.p. 2893) arrests/law enforcement; (R.p. 2902) principals.

There was no disparate treatment of Mr. Wilson. All jurors who indicate they wanted 100 percent proof were excluded. The issue is C.Cr.P. Arts. 798(3) and 797(1).

For an example of extensive voir dire see that of Mrs. Honea by the defense on page 3081 et. seq . . . He voir dired her exclusively from 3078 through 3084.

V. COMPELLING THE DEFENDANT'S PRESENCE

In this assignment, the defendant argues that by the third day of voir dire, i.e. through the 51st juror selected, every black venire person questioned had been struck. What the defendant fails to point out is that: Juror #3 Cedrick Hemphill, a black male, was excused on a challenge for cause by the defendant (R.p. 2098); Juror #5 Sammie Gray, a black female, was excused on a challenge for cause by the defendant (R.p. 2193) and Juror #22 Lottie Parm, a black female, was excused on a challenge for cause by the defendant (R.p. 2372). Therefore, while it is true that every black person had been struck, some strikes were by the defense.

The defense then moved to request that the defendant's presence be waived based on the speculative reason that the black jurors could see him and therefore were stating their opposition to the death penalty based on their knowledge that the defendant was black.

The facts belie this argument. Consider the answers of the black jurors examined among Jurors 1-51.

Juror #1 Carl Robinson was related to Everett English (a principal along with the defendant, tried earlier for murders and convicted) and maybe Divers and he went to school with Divers' mother (R.p. 2078). His mother lived one block from English's grandfather (R.p. 2097) and he knew a lot of people in the case related to English (R.p. 2099). He then went on to state his opposition to the death penalty (R.p. 2122) and he informed the Court (R.p. 2130) that he had very strong reservations about the death penalty. The Court (R.p. 2144) stated that the juror was excused for cause primarily because of his relations and because of his answers about the death penalty.

Juror #3 Cedrick Hemphill was excused by the defense (R.p. 2098) because he stated (R.p. 2089) he couldn't be fair and he felt like maybe the right person was caught. (R.p. 2088).

Juror #5 Sammie Gray knew the defendant's grandfather, Divers' mother, English's mother, James Divers himself (R.p. 2162) and she knew the victim's car had been left on a school lot (R.p. 2166). Excused for cause on defense motion.

Juror #8 Ira Cole was excused on a peremptory by the State after an earlier challenge for cause (on opposition to the death penalty) had been denied by the court. This juror had said more than once that she would *never* vote for the death penalty (R.pp. 2182, 2184 and 2187). She also indicated that she would hold the state to a

higher burden to convince her to even vote guilty knowing of a possible death sentence (R.p. 2186). The Court denied the State's challenge for cause evidently because the juror also told the Court (R.p. 2188) that she could vote for the death penalty if the evidence justified it.

Juror #9 Billie Hardwell, a black male, stated he could not consider the death penalty (R.p. 2254) because he didn't believe in the death penalty (R.p. 2255) and as he told defense counsel, he could vote guilty but would never vote for the death penalty. (R.p. 2259).

Juror #13 Veronica Harris, a black female, stated that she would never consider the death penalty (R.p. 2296) and that there was never a situation in which she could consider imposing a death penalty (R.p. 2304). Ms. Harris was excused for cause based on her opposition to the death penalty. (R.p. 2313).

Juror #17 Sam Standley, a black male, was excused by the Court on its own motion because he had hearing problems. (R.p. 2343).

Juror #18 Tommy Thomas, a black male, stated considering the death penalty was "just something I couldn't do . . . " (R.p. 2375) and he just couldn't vote for the death penalty. (R.p. 2377). He was excused for cause (R.p. 2379).

Juror #19 Michael Swinson, a black male, stated he did not believe in the death penalty under any circumstances (R.p. 2375) and he could not think of any situation where he would vote for the death penalty (R.p. 2378). He was excused for cause (R.p. 2379).

Juror #21, Lucious Owens, a black male, was excused by the Court (R.p. 2346) because he volunteered that he could not read.

Juror #22, Lottie Parm, a black female, was excused on the defense's request on a challenge for cause (R,p. 2372) because a victim was her next door neighbor at the time he was killed (R.p. 2365), she had met the mother of one victim, Stevenson, (R.p. 2366) and she knew the other victim's (Straughter/Vandervield) family (R.p. 2367).

Juror #24, Constance Ellis, a black female, stated that her aunt, first cousin and mother went to one of the victim's funeral (R.p. 2385). She also stated that she could not say death because she thought only God could choose the death penalty. (R.p. 2413). She was excused for cause (R.p. 2418).

Juror #38, Eula Francis, a black female, worked with one victim's sister (R.p. 2588). She was unequivocal in her opposition to the death penalty (R.p. 2582). She was excused for cause (R.p. 2591). The juror indicated that her opposition to the death penalty was *long standing*, i.e. not just because she saw Divers in the courtroom and therefore knew that a black man was on trial. She stated that she had written an essay on her opposition to the death penalty in college (R.p. 2583).

Juror #42, Henry Drumgo, a black male, stated he would absolutely not consider the death penalty (R.p. 2684) because he could not sit in judgment of his "brother" (R.p. 2689) and *he had been opposed to the death penalty for the last ten years* (R.p. 2689). He was excused for cause (R.p. 2691).

Juror #44, William Nelson, a black male, stated that he could not consider the death penalty (R.p. 2734) and that it was never appropriate because " . . . somewhere down the line society had failed." He told defense counsel that there would be no point in his deliberating because " . . . I would be totally against putting this man to death" (R.p. 2743). He was excused for cause (R.p. 2747).

Juror #45, Claudene Moore, a black female, stated that she knew the victim Stevenson's family including his mother, his uncle, his aunt and she had attended his funeral (R.p. 2705). She told defense counsel that she was totally against the death penalty and could not be persuaded that it was appropriate (R.p. 2740) nor would she actually consider the death penalty in deliberation (R.p. 2741). She was excused for cause (R.p. 2747).

Juror #51, Wilbur Varner, a black male, stated that he could not consider the death penalty even for a second, that he was totally opposed to it (R.p. 2775) and would never consider it (R.p. 2776). He told defense counsel that he was opposed to the death penalty (R.p. 2791) and could never choose the death penalty no matter what he was shown (at the sentencing phase) (R.p. 2791). He was excused for cause (R.p. 2796).

It is obvious from the jurors' remarks that they were not opposed to the death penalty because the defendant was a black man. Furthermore, several stated that their opposition was long standing, Francis and Drumgo.

The defendant argues that recent case law *suggests* that the defendant may waive his presence during voir dire. In support of this suggestion, the defendant offers

Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). In *Illinois v. Allen*, supra, the defendant became unruly during his armed robbery trial and was removed from the courtroom during voir dire, was returned, removed again during the State's case in chief and was returned for the defense part of the trial. The Supreme Court did hold that a defendant could lose his right to be present at trial but it did not rule or suggest that a defendant could waive his right to be present at trial due to some wish to have the jury not see him during voir dire.

The trial court allowed Mr. Divers (R.p. 2630) to state his reasons for wanting to be excused. Divers' stated that he wanted to be excused because the Court was "very unfair" evidently on the change of venue examination. Defense counsel later informed the Court (R.p. 2635) that the defendant wished to make another statement on this issue of his presence, which defense counsel stated (R.p. 2635-36) was that the defendant only wanted to waive his presence during the jury selection process because he felt it would be better for the black jurors not to view him when they were examined on their views about the death penalty. The Court and the trial attorneys examined La. Code of Criminal Procedure Art. 831 et seq. Thereafter the Court concluded (R.p. 2645) that the defendant could not voluntarily absent himself in a capital case. The defendant was not allowed to absent himself pending the Court's decision. (R.p,. 2640).

The Louisiana legislature has the right to provide a law that makes no provision for the defendant to waive his presence in a capital case. There are reasons for the

defendant's presence, for example the option of terminating the trial if it seems the verdict will go against him [See *Crosby v. U.S.*, 113 S.Ct. 748 (1993)] and this defendant's earlier stated reason that he wished to represent himself. The State's attorney offered an argument that the jurors also had an equal protection right [*Batson v. Kentucky*, 106 S.Ct. 1712, 476 U.S. 79, 90 L.Ed.2d 69 (1986)] to see the person that they are expected to judge.

In the only capital case to examine this issue, *State v. Williams*, 258 So.2d 534 (La. 1972), the court established the principle that the presence of the defendant could not be waived at any stage of the proceedings, including juror instruction.

VI. CURTAILING DEFENDANT'S RIGHT TO FULL VOIR DIRE

In this assignment, the defendant complains of the examination of the 28th prospective juror, Marilyn Robinson, during the voir dire on the death penalty of panel #7, The State began the voir dire on p. 2458. At p. 2462, the defense objected to a comment by the prosecutor and at p. 2467, the prosecutor objected to a defense question. The prosecution voir dired four jurors on this panel between pp. 2459 and 2465, and pp. 2471-72. The defense voir dire began on p. 2465 and ran through p. 2470 and again at pp. 2473 through 2474. Neither side was curtailed in their examination and re-examination.

The defendant complains of the trial court preventing him from asking the 10th prospective juror, Greer, about his death penalty views. The Court (R.p. 2264) admonished defense counsel to ask " . . . questions in the context

of what the law is . . . not all kind of . . . theories or possibilities. We would be here forever if that were allowed." Defense counsel was asking the prospective juror what he felt would make it an aggravating situation, when the aggravating circumstances to be considered were clearly set out in the law and did not include premeditation. The Court has the inherent power to prevent counsel from misstating the law (C.Cr.P. Art. 905.4) and here the Court was doing nothing more than that.

Defense complains of the trial court sustaining a State objection to a question to a juror about how easy it would be for her to consider a life sentence (R.pp. 2595-96). This prospective juror, Ms. Wasser, (at p. 2595) stated she could choose life imprisonment rather than the death penalty. Defense counsel then asked her how easy it would be for her to consider a life sentence, to which the State objected. The court found the question improper. It is apparent throughout the voir dire, that the trial judge attempted to direct both sides' challenges for cause on the death penalty issues to cover those listed in C.Cr.P. Art. 798 and 797. This juror was ultimately excused on a peremptory challenge by the defense (R.p. 2629) after she stated she worked with a police agency, Metro Narcotics, on a case.

The defense complains of the curtailment of its question of prospective juror #67, Josh Hollis. The Court (R.p. 3148) sustained an objection to a defense question on other grounds than the State offered. The defense counsel argued that there was " . . . an oversight on my part, Your Honor." This was not attempt by the Court to curtail defense examination, it was also not an instance where the Court sustained the D.A.'s objection. The defense

rephrased its question, which the juror answered. This juror was not challenged by the defense on any grounds. The defense questioned this juror for a total of nine (9) pages on the issue of the death penalty.

The cases offered by the defense on the issue of curtailment, *State v. Maxie*, 93-2158 (La. 4/10/95) 653 So.2d 526; and *State v. Robertson*, 92-2660 (La. 1/14/94); 630 So.2d 1278, 1280 are cases involving the denial of challenges for cause. No challenges for cause were offered by the defense on Jurors Hollis or Robinson.

The defendant complains that he was shut down in his examination of prospective juror 54, later juror #6, Dorothy Christian. What the trial court actually stated was that (R.p. 2904) "Both the state's question and your follow up to it is not . . . mean nothing in this case" and (R.p. 2905) "well, you can finish your question, but I . . . I'm . . . that question will not be allowed again . . . by either side."

This entire voir dire began on page 2076 and ended with the selection of the 12th juror, Earlean Bass on page 3491 of the record. A voir dire this extensive can hardly be categorized as one containing any curtailment. Objections by both sides were sustained by the Court without any evidence of a pattern of favoritism or curtailment.

For example the Defense objections to the State voir dire are found at (R.p. 2192), (R.p. 2301) (sustained); (R.p. 2462) (overruled); (R.p. 2601); (R.p. 2968) – the Court advised the State to rephrase; (R.p. 2993) (overruled); (R.p. 3035) – the Court sustains as to both sides; (R.p. 3037) (overruled); (R.p. 3153) (not sustained); (R.p. 3249)

(overruled) (R.p. 3264) (overruled); (R.p. 3267) (sustained). The State objections (R.p. 2305) (Court response "Well go ahead"); (R.p. 2467) (sustained); (R.p. 2595) (sustained) (State objected) (R.p. 2990) – to which defense replied "I'll correct myself" ; (R.p. 2991) – (not sustained); (R.p. 3056) (not sustained); (R.p. 3057) (sustained); (R.p. 3128) (overruled); (R.p. 3140) (not sustained); (R.p. 3148) (not sustained) but Court advised defense attorney to be consistent and told him to go ahead. The Court interrupts defense at pages 2261, 2264, 2904, 3263 and the State at 2472.

There is no pattern of limiting or demeaning the defense such as that found in *State v. Hall*, 616 So.2d 664 (La. 1993).

VII. DENIAL OF MOTION TO QUASH

On the record made herein, (R.pp. 943-1032), the Court found no basis for granting the Motion to Quash. The Commissioners testified that they had no idea as to the race of the persons selected and that no effort was made to "stack" the selectees by race, residence or any other way than to eliminate a person who had been selected within the last two years.

There was no showing of a deliberate or systematic bias to exclude any class of citizens.

It is submitted that the ruling of the trial court is correct under the Fourteenth Amendment to the U.S. Constitution and the Louisiana Constitution and *State v. Revere*, 572 So.2d 117 (La. App. 1 Cir. 1990).

It should be further noted that there had been no meeting of the threshold requirement to demonstrate the need for an expert to assist the defendant in analyzing the composition of the grand jury.

VIII. EXCUSAL OF JURORS WHO EXPRESSED RESERVATIONS ABOUT DEATH PENALTY

In this assignment, the defendant alleges that the trial court's excusal of a number of jurors who expressed non-disqualifying reservations about the death penalty violated his rights to due process and reliable capital sentencing.

These *jurors* expressed the following views:

a. Carl Robinson (#1)

This juror expressed strong reservations about the death penalty but actually the Court stated that its reasons for granting the State's challenge for cause (R.p. 2144) were primarily because of relations and because of his answers on the death penalty.

His answers were: (R.p. 2102) "If there is *any* doubt, you know, I hate to see any young men's lives destroyed" in effect; (R.p. 2105) he'd have to be real certain, he stated "There is probably a lot of people up there in jail that is innocent."; (R.p. 2110) if there is any chance that he is innocent – he will look for that (not guilty); (R.p. 2122) To make the death sentence – He would not like to make that decision; (R.p. 2124) When questioned whether he even wanted to consider the death penalty in a case like that

(case where the defendant is guilty of murder of adults) – He responded "Would I want to consider it? There is other alternatives – I would rather take some other alternatives than death." When asked whether he would choose a life alternative over death, he responded "I think I would". (R.p. 2125) When asked would he probably go with the life sentence, he said, "Over death, yes"; (R.p. 2126) He is bothered by fact that in other states there is no death penalty; (R.p. 2127) He doesn't like the death penalty; (R.p. 2127) When asked could he ever consider it, he responded that only possibly if it was proven that there was a lot of pain and suffering; (R.p. 2129) He's not saying that under no circumstances could he vote for it *but* (R.p. 2130) "But I mentioned some evidence that. . . . might need to be there for me to vote for it;" (R.p. 2130) tells court that he has "very strong reservations about death penalty"; (R.p. 2132) Court asked if jury voted guilty and state presented aggravating factors and you were satisfied that those aggravating factors justified the death penalty, could you impose it. He answered that it would be hard; (R.p. 2132).

b. Constance Ellis (#24)

Her answers were:

(R.p. 2412) Voir dire on death penalty by Slaughter; (R.p. 2413) she couldn't say death – She could say life. She thinks only God who can choose death penalty (R.p. 2415). Voir dire on death penalty by Rambo very extensive.

c. **Bennie Owens (#70)**

Her answers were:

(R.p. 3223) Voir dire by Slaughter on death penalty – "Only in certain cases would I consider the death penalty for someone"; (R.p. 3226) When questioned would you want to be 100 percent certain in guilt phase, knowing possibility of death, she answered "I wouldn't be so quick to, you know, . . . you know, in favor of killing someone, you know"; (R.p. 3227) basically wants no doubts, wants to be so certain that she has absolutely no doubts; (R.p.3232) Asked if she wants to be 100 percent certain and will not vote guilty unless she's 100 percent certain, she says yes; (R.p. 3236) Argues somewhat with Mr. Chambless – she does believe in death penalty; (R.p. 3237) Rambo on death penalty; (R.p. 3244) Juror is confused, "Well you said if we all voted guilty . . . you know, that that automatically means that the death penalty . . . "; (R.p. 3245) At penalty phase she says she could consider both penalties (long diatribe by defense – 8 pages – juror only answers yes to all questions – i.e., he doesn't let her express her feelings; (R.p. 3249) Questioned if you have conscientious scruples in your heart on your conscience, whatever, against the infliction of capital punishment, you may make that known. Do you have conscientious scruples that you think. . . . you're . . . you're against it? She answered, "yes, and I still say" – interrupted by

Rambo; (R.p. 3253) By Court: She has conscientious scruples against the infliction of capital punishment; (R.p. 3253) Court asked "Regardless of the evidence would you automatically vote against capital punishment in this case regardless of what the evidence produces over the next several days?" She responded, "I'm sure I would"; (R.p. 3255); Court asked would that attitude (conscientious scruples against) prevent you from making an impartial decision as to the guilt of the defendant in this case. She answered, "Yes, I think so." ; (R.p. 3257) On re-voir dire on death penalty by Rambo, she indicates, if she had an alternative to death penalty, she'd take it; (R.p. 3265) Re-voir dire on death penalty by Slaughter:

Q. " . . . if you had an alternative to death, it would be that?

A. Yes.

Q. And your alternative that it would be life?

A. Yes.

Q. And you would always take the alternative?

A. Yes, in certain cases.

Q. So in some cases you would automatically vote against the death penalty? Cases where it wasn't a child who was killed or an old person?

A. Yes."

d. Gracie Walker (#71)

Her answers were:

(R.p. 3233) "I want to be a hundred percent certain"; (R.p. 3236) She agrees with juror Chambless – he could not vote for death penalty, "I don't want to judge anybody" . . . because my religion tells me who am I to judge anybody; (R.p. 3245) Rambo on death penalty – long diatribe of 4 pages – he gets yes or yes I would answers, i.e. he never lets juror put her own words into her on phraseology; (R.p. 3248) she says she'd consider both options; (R.p. 3255) Voir dire on death penalty by Judge:

Q. Do you have conscientious scruples or serious problem against the infliction of capital punishment or the death penalty?

A. Yes; (R.p. 3256)

Q. And is your attitude toward the death penalty, would that attitude prevent you from making an impartial decision as to the defendant's guilt in this case.

A. Well, . . . no, I . . .

(R.p. 3261) Re-voir dire on death penalty by Rambo:

Q. . . . Do you have. . . . reservations . . . against the death penalty in your conscience?

A. Yes.

A. I strong . . . I would recommend the . . . I would say life imprisonment but later says she would consider death too.

(R.p. 3264) Re-voir dire on death penalty by Slaughter:

Q. You told Mr. Rambo that you would not automatically vote against the death penalty?

A. Right.

Q. You said you'd consider death or life?

A. Right.

Q. Would you always choose life?

A. Yes.

Q. You would never vote death?

A. Right. (R.p. 3265).

The standard set in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 814 (1985) and Louisiana Code of Criminal Procedure Articles 797 and 798 guided the Court in this case.

This issue was examined in *State v. Ross*, 604 So.2d 1036, 1041 (La. App. 1 Cir. 1992). In *Ross*, the Court stated:

" . . . The erroneous denial of a challenge for cause is not automatically reversible error. To defeat application of the harmless error rule, the defendant must establish that he was prejudiced by the Court ruling . . .

. . . although defendant did use a peremptory challenge to remove Davis from the jury and ultimately exhausted all of his peremptory challenges before the last two jurors were selected, we conclude defendant has failed to establish that he was prejudiced by having to use a

> peremptory challenge to excuse Mr. Davis. Neither before the trial court nor before this court does defendant argue that the final two jurors were objectionable or that he was not tried by an impartial jury . . .
>
> The trial court is vested with broad discretion in ruling on a challenge for cause, and its ruling will not be disturbed on appeal absent a showing of abuse of discretion. A challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice, or inability to render judgment according to law may be reasonably implied. . . . " (Citations omitted).

The issue of a juror, such as Walker and Owens above, initially indicating unequivocal opposition to the death penalty and then being rehabilitated, was examined in the case of *State v. Williams*, 615 So.2d 1009 (La. App. 1 Cir. 1993). In *Williams*, the defendant essentially argued that although a juror initially indicated during voir dire he could not impose the death penalty, he was subsequently "rehabilitated." During his voir dire examination, the juror consistently responded no less than eight times that under no circumstances would he vote to impose the death penalty; however, he then indicated he would consider the death penalty in the hypothetical situation in which an offender had broken into a house, raped two children, and killed them by cutting their throats. Thereafter the Court examined the juror as follows:

THE COURT: . . .

Mr. Williams, Darnell Williams, when I talked to you earlier, I asked you the question if under any circumstances could you possibly give the death sentence and you said, "No." Is that correct?

MR. WILLIAMS:

Yes, sir.

THE COURT:

So under no circumstances would you give the death penalty, is that correct?

MR. WILLIAMS:

Yes, I do. When the lawyer said about Ms. Johnson would said (sic) she had two little kids, all right, and a[n] older person raped them. That would be the only way I sway for the death penalty because, you know, an adult hurting two little small kids. . . .

THE COURT:

Okay, so you're saying when the rape of the children is involved like, but all other circumstances, "No"?

MR. WILLIAMS:

In the situation with the little kids, yes, the death penalty would be provided.

THE COURT:

Okay. In this case there are no little, there's no rape of any little kids.

MR. WILLIAMS:

> It's more like in this case here, it's more equal. All right. You got two people that know better, you know, you got one person . . .

THE COURT:

> Okay, let's not go into the facts of the case. I'm just saying that in this particular case, the one that's before us now, you could not consider the death penalty, is that correct?

MR. WILLIAMS:

> In the case, I'd have to see the facts just to know the evidence would be given.

THE COURT:

> Okay, now, again, I asked you a little while ago and you said, "Under no circumstances would you consider it." Now, you tell me that you may be able to consider it. I need to get an answer from you, Mr. Williams. Can you consider, listen closely, can you consider the death penalty in this particular case? I'm not saying to give the death penalty or not to give it. I'm asking if you can consider to give the death penalty in this case? Yes or no?

MR. WILLIAMS:

> Yes.

On review, the Appellate Court found (at p. 1018) that:

> " . . . our review of the entirety of Williams' responses during his voir dire leads us to conclude the total impression of his voir dire testimony was that his strong opposition to capital punishment would lead him to vote against the

> imposition of the death penalty. We find no abuse of discretion by the trial court in granting the challenge for cause. . . . "

In *State v. Tart*, 1996 WL 55944, 93-0772 (La. 2/9/96) the Court stated that: "a trial judge's great discretion is based on the fact that the trial judge has the benefit of seeing the facial expressions and hearing the vocal intonations of the members of the jury venire as they respond to questioning by the parties' attorneys. Such expressions and intonations are not readily apparent at the appellate level where review is based on a cold record. Furthermore, to the extent he or she believes it is necessary or desirable to do so, the trial judge has the benefit of the ability to directly participate in the examination of the members of the jury venire. As such, we are reluctant to reverse a ruling of the trial judge on a challenge for cause where it does not appear from a review of the record as a whole that the trial judge has somehow abused his discretion."

e. Other erroneous rulings

The defendant argues that the grant of a challenge for cause for 18 additional jurors (all state challenges) were erroneous without stating what the error was. Since they were all state requested challenges for cause, the error alleged must be that they were granted to the state, rightly or wrongly.

Hardwell (9th prospective juror) (R.p. 2254) stated he could not consider the death penalty even under any circumstances because he didn't believe in the death penalty.

Marks stated (R.p. 2258) she would be not be able to consider the death penalty and she would probably try to convince other jurors that they should not impose the death penalty. She told defense counsel (R.p. 2260) that under no circumstances would she vote for the death penalty.

Harris stated (R.p. 2296) she would never consider the death penalty and (R.p. 2296) there is never a situation in which she could consider imposing a death penalty.

Thomas stated (R.p. 2377) he just couldn't vote for the death penalty and he couldn't think of any situation where he could vote for the death penalty.

Swinson stated (R.p. 2375) that he did not believe in the death penalty under any circumstances and (R.p. 2378) could not think of any situation where he'd vote for the death penalty.

Barnes stated (R.p. 2413) he didn't think he could consider the death penalty and (R.p. 2414) "I would think that there would be a place for those people (guilty of first degree murder) without having to take their life."

Smelser stated (R.p. 2536) that she could not consider the death penalty under any circumstances.

Johnson stated (R.p. 2520) that although he had made up his mind that Divers was guilty he would not vote guilty under any circumstances because it's a death penalty case and (R.p. 2540) he couldn't consider the death penalty.

Balfour stated (R.p. 2525) that he did not believe in capital punishment and (R.p. 2540) "the death penalty would not be an option."

Lee stated (R.p. 2536) that she could not consider the death penalty, (R.p. 2541) "I just couldn't consider the death penalty."

Francis stated (R.p. 2582) that she could not consider the death penalty under any circumstances and she had even written an essay about her opposition.

Musick stated that (R.p. 2583) he didn't believe in the death penalty and would not consider the death penalty under any circumstances or (R.p. 2588) at all.

Moss indicated (R.p. 2684) she was adamantly opposed to the death penalty and that there were no circumstances under which she'd recommend the death penalty.

Drumgo stated (R.p. 2684) that he would absolutely not consider the death penalty because (R.p. 2689) he could not sit in judgment of his "brother".

Nelson stated (R.p. 2734) that the death penalty is " . . . never appropriate because somewhere down the line society has failed." He also stated he couldn't even deliberate on it " . . . because I would be totally against putting this man to death."

Varner stated (R.p. 2775) that he would never consider the death penalty, not even for a second, (R.p. 2791) "no matter what I was shown."

Wheatly stated (R.p. 2865) that he could never consider the death penalty and (R.p. 2875) there's never a case in which he could recommend the death penalty.

Williams stated (R.p. 3043) she was totally against the death penalty and there were no circumstances where there was a murder that she would say deserved the death penalty.

All of these granted State challenges for cause were denied.

B. LEGAL REPRESENTATION ISSUES

IX. In this assignment of error, the defendant complains that the trial court erred in denying his Sixth Amendment right to self-representation.

The transcript of the August 7, 1989 hearing concerning this issue, had not been transcribed at the time the defendant's brief was prepared; however, it has since been transcribed and is located in volume I of the supplemental record, pages 102-121.

The defendant-herein extensively briefs the law that he feels best supports his case. He also states that the trial court denied the request for self-representation. A thorough review of the transcript of the hearing reveals that is not the case.

Although the defendant's motion mentions that he may like to represent himself, the same motion also specifies that he wishes to obtain new counsel to assist him. Those two requests are listed in separate paragraphs and are not "tied" one to the other. In other words, it appears that the defendant was requesting two separate things

and would be satisfied upon the granting of either request. (R.pp. 363-364).

A review of the hearing transcript supports the State's contention. During the course of the hearing, the trial court asked the defendant to tell the court "the basis of [his] motion." (Supp.R. 103). The defendant began to speak and the trial court interjected explaining to the defendant that the court was having trouble understanding the defendant's position. (Supp.R.p. 104). The court then asked the defendant "what specifics do you allege?" (Supp. R.p. 104).

The defendant-herein then explained to the court that he felt his current attorney had not handled the case to the best of the attorney's profession and. . . .

> "I want another attorney, you know state appointed attorney, *or* I want to represent myself." (Supp.R.p. 104). (Emphasis added).

The trial judge then asked:

> "You want another attorney, state or appointed, *or* you want to represent yourself. Is that right? . . . " (Supp.R.p. 105). (Emphasis added).

The defendant-herein then responded:

> "You heard me right." (Supp.R.p. 105).

Based upon the court's perception that the defendant requested either new appointed counsel *or* the defendant wanted to represent himself, the trial court granted the defendant's request to remove his current two attorneys. The court then appointed two new attorneys to represent the defendant. (Supp.R.p. 102-121).

The issue was settled since the court had granted one of the defendant's request. Never again during the following pre-trial hearings and/or during trial was the issue of self-representation approached. It was not until now that the defendant even mentioned he was denied such a right.

Based on the foregoing and the record as a whole, the State submits that the trial court complied with the defendant's request. This assignment of error is without merit.

X. In this assignment of error, the defendant complains that the trial court erred in refusing to allow Attorney Rambo to withdraw from the case.

The defendant's complaint is premised upon the notion that since the trial court refused to allow Mr. Rambo to withdraw, the court actually denied the defendant his right to counsel under the Sixth Amendment to the United States Constitution and Article 1, Section 13 of the Louisiana Constitution of 1974. The defendant's contentions are misplaced.

The defendant places emphasis on the extent of the conflict test enunciated in *United States v. Walker*, 915 F.2d 480 (9th Cir. 1990).

Unless a Sixth Amendment violation is shown, the decision of whether to appoint a different lawyer for an indigent criminal defendant who expresses dissatisfaction with his court appointed counsel is a matter reserved for the sound discretion of the trial court. *United States v. Young*, 482 So.2d 993 (5th Cir. 1973).

The *Young* Court noted that:

> "[i]n order to warrant a substitution of counsel [for] trial, the defendant must show good cause, such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict which leads to an unjust verdict." Id. At 995.

The defendant-herein focuses his argument solely on the representation of Attorney Wilson Rambo and the initial lack of trust he had in Mr. Rambo; however, he makes only brief and insignificant mention regarding his other appointed attorney, Mr. James Sparks.

The defendant had some self-adopted preconceived notion that he could not trust Mr. Rambo. Pursuant to the evidence introduced at a hearing conducted on December 19, 1989, it is clear that no conflict actually existed. (R.p. 1040, et seq.) No information was ever communicated from Ronnie Womack to Mr. Rambo. As a matter of fact, Mr. Rambo never spoke to Womack about any matter whatsoever. Mr. Rambo was ready and willing to communicate with the defendant.

The Court, in denying the motion to dismiss Mr. Rambo, noted that the defendant was also represented by Ms. Aimee Lirette. (R.p. 1054). Later Ms. Lirette was allowed to withdraw and Sparks was appointed. At that time, the defendant began extensive communication with Sparks. It is also clear that some communication did indeed exist between Rambo and the defendant. (See Rambo's testimony, R.p. 1900).

The State-herein respectfully submits that the record as a whole reflects that the defendant's claim is insubstantial and that he received vigorous and able representation by Mr. Rambo as well as Mr. Sparks at trial. *United States v. Young*, supra, at 996.

The defendant has failed to show a conflict of interest, a *complete* breakdown in communication or an irreconcilable conflict which led to an apparently unjust verdict. He was, at all times, represented by two very competent attorneys.

This assignment of error is without merit.

XI. In this assignment of error, the defendant complains that he was denied the effective assistance of counsel by his lawyer's deficient performance.

While a claim of ineffective assistance of counsel is more properly raised in a post-conviction relief application, appeal courts may address the issue if the record contains sufficient facts to decide the issue. This is allowed in the interest of judicial economy. *State v. Seiss*, 428 So.2d 444 (La. 1983); *State v. Bennett*, 524 So.2d 932 (La. App. 2d Cir. 1988), writ denied 532 So.2d 148.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court first elaborated on the meaning of the constitutional requirements of effective assistance of counsel. The court declared: "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, supra at

2064. The court proceeded to enunciate a two-pronged test to be applied by the courts in judging an ineffectiveness claim:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial. A trial whose results is reliable. Unless the defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable."

The Louisiana Courts have utilized the *Strickland* standard in a number of cases. See e.g., *State v. Brooks*, 505 So.2d 714 (La. 1987); *State v. Moore*, 575 So.2d 928 (La. App. 2d Cir. 1991).

These cases stand for the proposition that judicial scrutiny of counsel's performance must be highly deferential and the court must refrain from second guessing particular strategy on hindsight.

As this Honorable Court, when examining an ineffective assistance of counsel claim in *State v. Bell*, 377 So.2d 275 (La. 1979) declared:

> "Are we to second guess the effectiveness of [counsel's] tactical choice at this time? Our hindsight cannot be based on the same considerations which undoubtedly influenced trial counsel, such as the character, attitude and

> background of the jurors, knowledge acquired by personal observation of them at voir dire; the defendant's demeanor, appearance and ability to articulate and impress his listeners; the State's witnesses' demeanor, appearance and ability to articulate and impress their listeners; the present attitude and past conduct of the trial judge in such cases; and the countless other factors influencing such a choice." Id. at 280.

The defendant advances several claims; however, he fails to support any of these claims. An example is his claim that his predecessor counsel had intended to try to introduce evidence of a statement allegedly made in a Monroe Tavern the night of the instant murders. The defendant claimed that the introduction of said statement was premised upon La. Code Ev. Art. 804(B)(6). The defendant's claim is not an accurate recitation of his predecessor counsel's position. That attorney simply stated that he *may* seek to introduce said statement should it become relevant. (R.p. 361).

Article 804(B)(6) deals solely with civil cases, although the comments indicate that in certain cases, the article may apply to criminal cases. Notwithstanding that observation, the article would not be applicable to the facts of this case even if there were no doubt that the article was generally applicable to criminal as well as civil cases.

Article 804(B)(6) provides in pertinent part:

> "A statement not specifically covered by any of the following exceptions if the court determines that considering all pertinent circumstances in the particular case the *statement is trustworthy*. . . . "(emphasis added).

The issue is whether or not the statement is trustworthy. It is clear that the circumstances in this case truly indicate that the instant statement is not trustworthy. The trial court heard all of the testimony related to the alleged statement. (R.p. 823 et seq). The Court of Appeal, Second Circuit, subsequently denied writs regarding the defendant's attempt to learn the identity of the informant. (R.p. 344). The Court reasoned that the informant did not know the true identity of the person who was alleged to have made the instant statement. Based upon all of the evidence adduced and reviewed by both the trial and appellate court, it is obvious that the statement was not trustworthy.

The defendant also complained about the defense counsel's decision to have him testify. The defendant, on the one hand in Assignment of Error IX, complained that he should have been allowed to represent himself; however, on the other hand, he now complains that he did not make a good witness. Those two arguments are not consistent with one another and cannot be reconciled.

The defendant has failed to meet either prong of the Strickland test.

XII. In this assignment of error, the defendant alleges that he was denied effective assistance of counsel on his appeal by his inability to obtain a full and complete transcript of the pretrial and trial proceedings which resulted in a judgment ordering his execution.

This assignment of error is not directly related to pretrial or trial issues with which defense counsel was involved nor does the State have control over such matters.

These matters are best resolved by court order. It is the State's understanding that certain orders have been issued by this Honorable Court. It is within the inherent authority of this Honorable Court to insure that the lower courts comply with such orders.

C. PRETRIAL EVIDENTIARY RULINGS

XIII. In this assignment of error, the defendant alleges that he was illegally arrested in his home; without a warrant, and in the absence of probable cause, exigent circumstances or consent.

The facts of the case reveal that on or about May 3, 1988, Detectives Murray and Antrobus, of the Dallas Texas Police Department, observed a relatively new Dodge Shadow backed into an apartment complex lot. The vehicle had a Texas license plate on the rear; however, the front of the vehicle bore no such plate. (Texas law requires that a plate be mounted on the front as well as the rear). The officers requested a registration which later revealed that the plate itself was stolen. They then requested an NCIC check which revealed that the vehicle was stolen and was involved in the homicides presented in the instant case.

The detectives attempted to locate persons who may have had information regarding the driver of the vehicle. They spoke with two people identified as Billy Wayne Lee and Dianna Green who told the detectives that they believed the driver to be a black male, light skinned with a mustache and either missing a front tooth or having a gold tooth.

The officers were informed that the driver went by the name of James and was recently seen by them entering a particular apartment. The officers checked the apartments; however, no such person was located at that time.

Shortly thereafter, Dallas officers notified Lt. Royce Toney, of the Ouachita Parish Sheriff's office, that the vehicle had been located. Toney asked them to secure and process the vehicle.

The initial officers then recontacted Lee, one of the people to whom they had spoken the day before. Lee informed the officers that the driver could be located at 2902 Cleveland, Apartment 206.

Detectives Toney and Billy Myers, of the Ouachita Parish Sheriff's Office arrived in Dallas. The Dallas and Ouachita Parish officers then proceeded to Cleveland Street. They spoke with the apartment manager and others and learned that "James" had been seen peeking out of the window of apartment 206.

The first knock on the door yielded no response. The officers then went to get the manager. The manger advised the officers that a Sharon Felder was the apartment lessee. The manager further advised them that she had not seen Felder for some time and she was concerned for Felder's safety. The manager described the man in apartment 206 as "James who is wanted in Louisiana for murder."

The manager did not have a pass key to the apartment because Felder had changed the lock. The officers, at that time, knew that the person who had been driving

the car was a black male named "James". They also knew that the man who was inside the apartment was a black male named "James".

The officers, faced with exigent circumstances, reached through a window, unlocked the door, and entered. Upon entering, the officers located a woman, Annie Benton, in one of the bedrooms.

The officers, concerned for Sharon Felder's safety, began a search of the apartment. The officers noticed that one closet had chairs stacked in front of it. They moved the chairs and found James Divers hiding inside of the closet.

Divers identified himself as Jessie Divers. He produced a birth certificate to that effect. Divers was escorted from the apartment. He was wearing a jacket later identified as belonging to one of the victims.

The officers escorted Divers to the Dallas Police Department where he was mirandized. He told the officers that he had bought the Dodge vehicle for two hundred dollars worth of cocaine from some drug dealers. He subsequently told the officers that they could arrest him, but they did not have a weapon.

The defendant-herein argues that the officers arrested him without probable cause and absent exigent circumstances. The State contends otherwise.

EXIGENT CIRCUMSTANCES AND PROBABLE CAUSE TO SEARCH

The vehicle belonging to one of the instant victims was located near the apartment where the defendant was

located. The vehicle had been stolen less than one month prior to that time. The description of the driver was the same as the description of the person who had entered apartment 206. All witnesses stated that they were afraid of the person they called "James", because he was a dangerous person. The manager, and others, described him as "James who is wanted in Louisiana for murder." He was not the lessee of the apartment and the manager had not seen Sharon Felder for some time. The manager was concerned for Felder's safety. James was seen, only minutes prior to the officer's arrival "peeping" from behind the curtains of the apartment. All of these factors led the officers to believe that James feared his immediate apprehension.

It is true that the Court in *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990) found that exigent circumstances did not exist under the facts presented in that case. The court however, noted that their holding was based upon the "fact-specific" application by the lower court. In so-holding, the Court implied that its holding was not to be broadly applied. In other words, it was founded upon the facts as they existed in that case.

The facts of the *Olson* case are distinguishable from those in the instant case. In the *Olson* case, contrary to the instant case, the police had already recovered the murder weapon. More significantly, the owners or lessees of the residence were inside the apartment with Olson. There was no suggestion of danger to them.

The facts of the instant case, as previously stated, clearly shows that the lessee, Sharon Felder, was not

inside her apartment and the manager had not seen Felder and was concerned for her safety.

Based upon the foregoing and in particular the facts of this case, it is clear that the police were reasonable in believing that exigent circumstances existed. Further, as the trial court agreed, the manager had authority, under the unique facts of this case, to consent to said search. (R.pp. 208-209).

EXPECTATION OF PRIVACY

The defendant-herein places great emphasis upon the fact that, in his words, he was more than merely a guest. The State disagrees. Although the burden of proof is upon the State to justify a warrantless search, an arrestee in the home of a third party should have the burden of proof to establish that he indeed had a reasonable expectation of privacy. *State v. Rivers*, 420 So.2d 1128 (La. 1982).

The State-herein contends the defendant's expectation of privacy is not necessarily relevant considering the fact that exigent circumstances did exist. However, notwithstanding that observation, the State will address the issue.

The defendant attempted at hearing and in brief to argue that he had been living at the apartment for some time. The trial court even commented that the record did not really establish the defendant's expectation of privacy. (R.pp. 188-189, 208-209). The trial court merely assumed as much for the sake of argument.

The facts of this case just as reasonably infer that the defendant may have coerced Felder into housing him in

her apartment. The defendant did not establish facts to indicate the contrary. If that be the case, the defendant had no real expectation of privacy short of that fabricated in his own mind.

The defendant, in argument, alleged that the officer's actions violated Felder's expectation of privacy; consequently, the defendant had standing to raise the alleged illegal entry and search since it allegedly adversely affected him. (R.p. 186).

The defendant-herein bases his argument upon the provisions of Louisiana Constitution Article 1, Section 5, which ordinarily would allow one adversely affected by an illegal search of another, standing to contest the search and seizure. The defendant overlooks the obvious. This instant search and/or seizure occurred in Dallas, Texas; consequently, the search and/or seizure must be reviewed pursuant to the constitutional provisions for the State of Texas, and the Fourth Amendment. (*State v. Rivers*, 420 So.2d 1128 (La. 1982).

Texas Constitution Article 1, Section 9 provides:

> "The people shall be secure in their persons, houses, papers and possession, from all unreasonable seizures and searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, not without probable cause, supported by oath or affirmation." (Vernon's Texas Statutes and Code Annotated Constitution of the State of Texas 1876).

It is clear that the State of Texas does not afford protection against unreasonable searches and seizures to persons merely adversely affected; consequently, even if the

search and/or seizure were unlawful with respect to Sharon Felder, the defendant, under Texas law, would have no standing absent his own reasonable expectation of privacy.

PROBABLE CAUSE TO ARREST

The defendant argues that the police did not have probable cause to arrest him for murder. The defendant's argument overlooks the probable cause to arrest for unauthorized use of a movable and/or illegal possession of stolen property, to-wit, the Dodge Shadow.

Assuming for the sake of argument only, that the police did lack probable cause to arrest the defendant for murder the officers would have been justified in making the instant arrest.

In *State v. Wildens,* 364 So.2d 934 (La. 1978), this Honorable Court, for the first time, examined whether an arrest for a crime for which probable cause did not exist could ever be justified by the probable cause to arrest for another offense. Id. at 937. This Court noted that:

> "[s]everal of the federal courts of appeal have given an affirmative answer in cases in which the arrest was not a pretext for an illegal search, but in which the officer, who had probable cause to arrest the defendant for a related offense, simply arrested him for the wrong reason." (Id. at 937 and cases cited therein).

This Court then reasoned that:

> "The rationale for [those] holdings seems to be that, except for pretextual arrests, which are

> shams and not considered arrests at all, the constitution requires only that an officer's actions be justified against an objective standard of probable cause, and it does not require that the State be penalized for a purely subjective mistake by an officer. (Id. At 937 and cases cited therein. Also see *State v. Collins*, 378 So.2d 928 (La. 1979), cert. denied, 100 S.Ct. 3025).

Probable cause to arrest exists when the facts and circumstances within the arresting officer's knowledge and of which he has reasonable and trustworthy information are sufficient to justify a man of average caution in the belief that the person to be arrested has committed . . . the offense; mere suspicion cannot justify the arrest, but the officer does not need sufficient proof to convict. *Collins* at 930.

LSA-R.S. 14:68 provides in pertinent part:

> "A. Unauthorized use of a movable is the intentional taking or use of a movable which belongs to another, either without the other's consent, or by means of fraudulent conduct, practices, or representations, but without any intention to deprive the other of the movable permanently. . . . "

LSA-R.S. 14:69 provides in pertinent part:

> "A. Illegal possession of stolen things is the intentional possessing, procuring, receiving, or concealing of anything of value which has been the subject of any robbery or theft, under circumstances which indicate that the offender knew or had good reason to believe that the thing was the subject of one of these offenses."

The facts of the instant case reveal that the instant white Dodge Shadow was, on May 3, 1988, located next to a building in an apartment complex in Dallas, Texas. The vehicle was the same vehicle registered to Winston L. Vandervield, one of the instant victims. It had been missing since April 12, 1988.

When located in Dallas, the vehicle was bearing one Texas license plate which was located on the rear of the vehicle. Texas law requires that the vehicle also have a plate on the front of said vehicle. The Louisiana license plate which belonged on the vehicle, was missing.

The Ouachita Parish Sheriff's Office had earlier determined that Vandervield's vehicle was missing. They had entered the vehicle description into the NCIC computer along with information concerning the homicide. With the knowledge that Vandervield could not, because of his death, have given permission for anyone to use his vehicle and the knowledge that no member of Vandervield's family had done so, the instant officers clearly had probable cause to arrest the defendant for unauthorized use of the vehicle, notwithstanding the fact that they may not have been in possession, at that time, of proof sufficient to convict and the fact that the defendant was initially advised by Dallas authorities that he was being arrested for "investigation of a murder".

The officers also had sufficient probable cause to arrest the defendant for illegal possession of stolen things. The fact that the original vehicle plate was missing and had been replaced with a stolen Texas plate was sufficient to establish said probable cause to actually make the arrest. See *Wilkens* and *Collins*, supra.

Wilkens and *Collins, supra,* stand for the proposition that the instant arrest was valid regardless of the reason the defendant was told he was being taken into custody.

EVIDENCE ADMISSIBLE EVEN ABSENT EXIGENT CIRCUMSTANCES

The defense places much emphasis on the holding of *Payton v. New York,* 445 U.S. 589, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). It is true that the evidence obtained in *Payton* was suppressed; however, the defendant clearly overlooks the reasoning of the *Payton* court. The rule in *Payton* was designed to protect the physical integrity of the home . . . *United States v. Harris,* 495 U.S. 14, 110 S.Ct. 1640, 109 L.Ed.2d 13 (1990).

In *Harris,* officers made an illegal entry into a home. The officers had probable cause to arrest Harris; however, they made the entry without a warrant. Harris made statements both inside his home and at the station house once he was removed from his home.

The Court analyzed its previous holding in *Payton.* The Court accepted the fact that since there were no exigent circumstances, the warrantless arrest of Harris in his own home violated the Fourth Amendment; however, as in earlier cases, the court declined to adopt a "per se or but for rule" that would make inadmissible any evidence which somehow comes to light through a chain of causation that begins with an illegal arrest. (See *Harris* at 1642).

The Court stated that the rule in Payton:

> "was not intended to grant criminal suspects . . . protection for statements made outside their premises where the police have probable

> cause to arrest the suspect for committing a crime." Id. at p. 1643.

The officers in the instant case, as did the officers in *Harris*, had probable cause to arrest the defendant for a crime. The defendant-herein, just as Harris, was not unlawfully in custody when he was removed to the station house. To paraphrase the *Harris* Court:

> "For Fourth Amendment purposes, the legal issue is the same as it would be had the police arrested [Divers] on his doorstep, illegally entered his home to search for evidence, and later interrogated [Divers] at the station house. Similarly, if the police had made a warrantless entry into [Divers'] home, not found him there, but arrested him on the street when he returned, a later statement made by him after proper warnings would no doubt be admissible. Id. At 1643.

The holding of Harris is as follows:

> "[w]here the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton*. Id. at p. 1645.

ADMISSIBILITY OF STATEMENT MADE INSIDE THE APARTMENT

Assuming for the sake of argument only that the instant officers were not confronted with exigent circumstances thereby entering apartment 206 illegally since they had no arrest warrant, then perhaps the statement made inside the apartment should be suppressed. That

statement amounted to nothing more than the defendant telling the officers that his name was "Jesse Divers" rather than "James Divers".

Notwithstanding that observation, the State still contends that the officers were confronted with exigent circumstances; consequently, the statement is admissible.

ADMISSIBILITY OF STATEMENTS MADE AT POLICE STATION AND STATEMENTS MADE ENROUTE FROM TEXAS TO LOUISIANA

Should this Honorable Court rule that no exigent circumstances existed thereby suppressing the statement of identity inside the instant apartment, the subsequent statements made by the defendant would still be admissible. Failure to comply with *Miranda* is not an issue since testimony clearly revealed that the officers, on several occasions, properly mirandized the defendant. The only issue would then be whether the subsequent statements were the fruits of the alleged illegal entry.

The defendant-herein was in legal custody at the Dallas police station just as *Harris* was in legal custody. The same rationale applied by the *Harris* court as to the statement with which they were confronted equally applies here. That rationale is that the instant statements, while the product of an arrest and being in custody, *[were] not the fruits of the fact that the arrest was made in the house rather than some place else. United States v. Harris, supra* at 1644. In other words, the holding of *Harris* which clearly states that when probable cause to arrest exists, the exclusionary rule does not bar the use of statements made outside a home; even though the initial arrest was made

in violation of *Payton*, stands for the proposition that the instant statements are admissible. *Harris* at 1645.

ADMISSIBILITY OF THE VICTIM'S JACKET

The jacket to which the defendant makes reference was one which was in his possession and later identified as belonging to one of the instant victims. The testimony clearly shows that when the defendant accompanied the officers to the police station, the defendant requested the jacket. The officers complied with the request. (R.p. 1284).

At no time did the officers search for and retrieve the jacket pursuant to some preconceived notion that it belonged to a victim. They were unaware that the jacket existed. Once the defendant was taken into custody in possession of the jacket, the police legitimately took possession of said jacket. Then once the jacket was identified, it was admissible as evidence against the defendant.

SEARCH AND SEIZURE OF THE DODGE SHADOW

The defendant has no legal standing to contest the seizure and/or search of the Dodge. The evidence clearly shows that the Dodge was stolen. The owner was dead; consequently, he could not have given the defendant permission to use the vehicle.

The defendant had every reason to believe that the vehicle was stolen even if one were to assume that he came into possession of it by the means related to the police.

The police knew the vehicle was stolen and that the only person who could legally have given anyone access to the vehicle was dead as the result of the murder. They were not required by law to secure a search warrant. Any evidence obtained as a result of the search is admissible.

HARMLESS ERROR ANALYSIS

In *State v. Taplette*, 545 So.2d 985 (La. 1989), this Honorable Court citing *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988), stated that " . . . [I]f the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict, the error is harmless and the verdict may stand." Id. At 988. The error complained of here is the admission in evidence of the instant statements and the jacket.

The evidence in this case clearly shows that the defendant's fingerprints were found on a highball glass located inside the victim's home. The defendant's fingerprints were also found on the beer can and an orange juice bottle which were located inside the same residence. (R.pp. 3851-52, 4155 and 4157). Further, shoeprints caused by the defendant's shoes or shoes with corresponding characteristics, were located in the victim's carport. (R.pp. 3877-3884). In addition to the aforementioned evidence, two witnesses, who had served time in jail with the defendant, testified about incriminating statements made by the defendant. (R.pp. 4342-4382, 4395-4431).

Based on the foregoing analysis, it is clear there was sufficient evidence to convict the defendant should this Honorable Court decide that the trial court was in error regarding the instant statements.

XIV. In this assignment of error, the defendant alleges that the trial court erred in denying him access to a crime stopper's report identifying a witness who tipped the police that a drunken white man confessed shortly after the homicides to having "just killed two niggers".

This issue was litigated at length in the trial court and court of appeal. (R.pp. 849-908 and 344). The defendant attempts to make much ado about the fact that he never actually received a copy of the instant crime stoppers report. He bases his argument upon constitutional grounds; however, the bottom line is that he wanted the name of the informant so that he could allegedly extract the identity of the mysterious white male from the informant.

The record is quite clear that the report did not contain exculpatory evidence nor evidence favorable to the defense. The Court of Appeal specifically noted that the informant (caller) did not know the whereabouts nor the identify of said white male. (R.p., 344).

The defendant has failed to show that ruling to be invalid. This assignment is without merit.

XV. In this assignment of error the defendant alleges that the police violated the Sixth Amendment and Article 1 Section 13 of the Louisiana Constitution of 1974 when they questioned him during extradition in the absence of counsel.

The defendant argues that Detectives Toney and Myers knew that he had an attorney, and consequently, they should not have questioned him during the trip from Dallas to Ouachita. Although the defendant cites several

pages in the record, the record is devoid of any indication that they knew he had a lawyer who represented him on the instant charges. As a matter of fact, Detective Toney specifically testified that prior to leaving Dallas he once again *Mirandized* the defendant and the defendant at no time represented to Detective Toney that the defendant had an attorney or that he wished to have an attorney present. (R.p. 4305).

In support of his argument, the defendant cites *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), *State v. Hattaway*, 621 So.2d 796 (La. 1993) and several other similar cases. Those cases are not on point with the instant facts. Each of the cited cases deal with situations in which the defendant had made initial court appearances or the state was well aware that the defendants were represented by counsel and that representation was directly related to the respective substantive charges, not an extradition proceeding.

The initial detective did not know whether the defendant-herein was represented on the instant murder charges and the defendant did not advise the detectives of that information. Notwithstanding that observation, the instant facts indicate that the defendant actually initiated the relevant conversation which brought about the statements used in evidence.

This assignment of error is without merit.

XVI. In this assignment of error, the defendant alleges that the police conducted an extensive warrantless search of the Dodge Shadow, in the absence of exigent circumstances. The essence of the allegation is that the police allegedly violated the defendant's rights under the

Fourth Amendment of the United States Constitution and Article 1 Section 5 of the Louisiana Constitution of 1974.

THE FOURTH AMENDMENT

This particular issue was partially addressed in Assignment of error XIII; however, the State will herein elaborate on its previous argument.

At the outset, the pertinent question, as stated by this Honorable Court in *State v. Rivers*, 420 So.2d 1128, 1132 (La. 1982) is whether [this defendant] had a reasonable expectation of privacy in the [instant vehicle]. The State herein respectfully submits that he did not.

This Honorable Court in *State v. McCommons*, 398 So.2d 1100 (La. 1981) had an occasion to examine the Fourth Amendment and the expectation of privacy. This Court stated:

> "The Fourth Amendment guarantees 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' Its essential purpose is to shield the citizens from unwarranted intrusion into his privacy. *Silverman v. United States*, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961). To invoke the protection of the Fourth Amendment, *a person must show that he had a reasonable expectation of privacy which was invaded by the government's actions.* (Emphasis added). There are two facets to the proof: . . . first that a person has exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable' . . . " *Katz v. United States*, 389 U.S. 347, 361; 88 S.Ct. 507, 516; 19

L.Ed.2d 576, 588 (1967) (Harlan, J. Concurring). (Also see *Rivers, supra* at 1132).

The facts and holding of *Rivers, supra,* are not, as suggested by this defendant, inapplicable to this case. Rivers was involved in a homicide which occurred in the State of Louisiana. The victim's vehicle was subsequently stolen and was stopped by an officer in the State of Alabama. Rivers was an occupant of the vehicle. The driver and Rivers were removed from the vehicle and taken to the station house. The vehicle was left locked and parked on the side of the roadway. Once the Alabama authorities determined the vehicle was stolen, the vehicle was towed to a garage where it was searched without a warrant. The only distinction between these facts and the facts of the instant case is that this defendant was not even in the vehicle at the time it was recovered.

The defendant in *Rivers* advanced the same argument now raised by the defendant-herein; however, this Honorable Court, subsequent to the aforementioned analysis, held that Rivers did not have a reasonable expectation of privacy in a vehicle he knew to be stolen. The same reasoning should equally, if not more stringently, apply here.

The instant Dodge Shadow, when seized by the police, was unoccupied and parked in a lot. The vehicle was bearing a stolen Texas license plate which was affixed to the rear of the vehicle. Texas law requires that the vehicle bear a plate at both the rear and front for the vehicle. The Louisiana plate which belonged on the vehicle was missing. The defendant-herein was clearly in

possession of sufficient facts which would lead a reasonable person to believe or have good reason to believe the vehicle was stolen.

Based upon the foregoing analysis it is clear that the defendant-herein had no reasonable expectation of privacy with respect to the instant Dodge Shadow.

ARTICLE 1, SECTION 5 OF THE LOUISIANA CONSTITUTION OF 1974

The defendant-herein further argues that at the very least, he was adversely affected by the search pursuant to Article 1, Section 5 of the Louisiana Constitution; consequently, any evidence from the Dodge Shadow was inadmissible. This Honorable Court rejected such an argument in *State v. Rivers*, 420 So.2d 1128 (La. 1982). The search in Rivers occurred in the State of Alabama. The instant search occurred in the State of Texas. This Honorable Court held that since the *Rivers'* search occurred in Alabama, the court was not concerned with the provisions of Article 1, Section 5, of the Louisiana Constitution.

Although the defendant-herein attempts to distinguish the facts of Rivers and the instant case by virtue of the lone fact that the authorities in *Rivers* allegedly conducted their search via their own volition and the instant Texas authorities conducted their search at the request of the Ouachita Parish deputies, the State respectfully submits that distinction, if any, is tenuous at best. Accordingly, the holding of *Rivers* is equally applicable to this case.

Finally, the defendant's perception of the applicability of Article 1, Section 5 is further misplaced in that

he has failed to prove that the instant search was violative of another's right against unreasonable searches. In other words, even if the provisions of said article were applicable to a search conducted in another state, a defendant, in order to validly claim that he was adversely affected, would first have to prove that the authorities first violated another person's rights.

The defendant-herein cannot do so under the circumstances of this case. The only person who could have been affected by the initial search was a victim who had been murdered. Surely, it would be ludicrous to even infer that a murder victim would not desire that the police do every legal thing possible to apprehend the perpetrator. Consequently, at least inferentially, one must conclude that every murder victim would, if they could, desire that the police conduct searches of the victim's personal belongings in an attempt to obtain physical evidence which may assist with said apprehension.

There was no violation of the victim's rights in this case; consequently, the defendant could not have been adversely affected by the instant search.

EXIGENT CIRCUMSTANCES

The defendant-herein admits that the Dallas police possessed probable cause to seize and search the Dodge Shadow; however, the defendant argues that exigent circumstances did not exist, therefore the police should have obtained a warrant prior to the search. The defendant's reliance on the non-existence of exigent circumstances is misplaced.

The facts of this case, although not occurring upon a highway, fall squarely within the ambit of the so-called "automobile-exception" to the warrant requirement. *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *State v. Lewis*, 378 So.2d 396 (La. 1979) and cases cited therein.

In *Chambers v. Maroney*, 399 U.S. 42, 51 S.Ct. 1981; 26 L.Ed.2d 419 (1970), the U.S. Supreme Court rejected the argument that "even though the police may have probable cause to search and there is danger the vehicle and its contents will disappear, only the immobilization of the car should be permitted until a search warrant is obtained." (Also see *Lewis, supra*).

In doing so the United States Supreme Court stated:

> "[A]rguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater'/ But which is the 'greater' and which is the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. *For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." Chambers v. Maroney*, 90 S.Ct. at 1981 and *Lewis, supra* at 398. (Emphasis added).

This Honorable Court in *State v. Lewis*, 378 So.2d 396 (La. 1979) reviewed cases dealing with the "automobile exception". This Court noted that:

> "A clear rule for determining when the police may invoke the automobile exception has yet to be fashioned by majority of the high court." Id. at p. 398.

This Court then reviewed several U.S. Supreme Court cases involving both vehicles stopped upon the highway and vehicles found unoccupied in public areas otherwise accessible to the public. This Court then held that the search of the *Lewis* vehicle, which was parked outside one suspects apartment, was reasonable. The Court stated:

> *"The automobile was parked in a public place, a city street outside [defendant's] apartment. It was therefore accessible to anyone who might have a reason to remove it or remove evidence from it, . . . Thus, the officers were faced with exigent circumstances requiring that they elect one of two courses 'reasonable under the Fourth Amendment' . . . either immobilize the car until a warrant is obtained or carry out an immediate search without a warrant."* Id. at p. 399. (Emphasis added).

This Honorable Court subsequently in *State v. Brooks*, 452 So.2d 149 (La. 1984), noted that the present standard for warrantless searches of automobiles was expressed in *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). This Court then reasoned that "for purposes for analyzing warrantless automobile searches, the mobile/immobile distinction is no longer relevant." Id. at p. 152 citing *State v. Hernandez*, 408 So.2d 911 (La. 1981) for the proposition that this Honorable Court, for purposes of the 'automobile exception' has not distinguished between a vehicle stopped while in motion and then searched and a vehicle parked in a public place accessible to persons who might either move it or remove

evidence from it. (See *Lewis, supra* and *State v. Brooks*, 483 So.2d 140 (La. 1986) Dennis, J. Concurring with majority opinion 452 So.2d 149 (La. 1984) for the proposition that *Lewis, supra* remains valid).

The holding of *Lewis* is equally applicable to the instant case. The instant vehicle, like the *Lewis* vehicle was parked in a public place. The instant vehicle, like the *Lewis* vehicle was accessible to anyone who might have had a reason to move it or remove evidence from it. Thus, the officers were faced with exigent circumstances requiring them to either immobilize it until a warrant was obtained or carry out an immediate search without a warrant. Either course was reasonable.

The facts of the instant case actually call for immediate action more so than those of *Lewis*. The vehicle in *Lewis* belonged to a suspect, but the instant vehicle belonged to a murdered victim. Since it was obvious that someone other than the victim had been in possession of the instant Dodge Shadow, the officers clearly were justified in their immediate search without a warrant.

XVII. In this assignment of error the defendant alleges that the trial court erred in denying the motion to suppress the evidence seized from the victim Vandervield's residence.

The defendant argues that since the instant search warrant was limited, the Ouachita Parish deputies could not seize any item not mentioned in the warrant. The defendant is incorrect. Once validly inside 1403 Mississippi Street, the police had the authority, to seize items not specifically mentioned in the warrant. Louisiana Code of Criminal Procedure Article 165 provides:

> "While in the course of executing a search warrant, a peace officer may make photographs, lift fingerprints, seize things whether or not described in the warrant that may constitute evidence tending to prove the commission of any offense, and perform all other acts pursuant to his duties."

The defendant, in *State v. Feeback*, 414 So.2d 1229 (La. 1982), made a similar argument. This Honorable Court reasoned that:

> "Relevancy and admissibility at trial is not the test governing the seizure of things by an officer while executing a search warrant. Rather, the standard is whether the items *tend* to prove the commission of any offense." Id. at p. 1232.

The defendant-herein lacks standing to assert a Fourth Amendment violation. The house at 1403 Mississippi Street was not his residence nor had he ever resided therein. The house was leased to Vandervield, one of the victims. Consequently, the defendant had no expectation of privacy in the structure.

Further, pursuant to the analysis regarding the Dodge Shadow in assignment of error XVI, the police did not violate Vandervield's rights. Since there was no initial violation (illegal search) the defendant cannot validly claim that he was adversely affected by the instant search.

Finally, the defendant claims that Vandervield's sister, Diana Ballard, did not have the authority to consent to the instant search; however, he fails to mention that the officers also secured the permission of the landlord. (R.pp. 81-82).

The State-herein respectfully submits that both the victim's sister and the landlord had the authority, under the circumstances, (lessor had been murdered) to authorize the instant search.

This assignment of error is without merit.

XVIII. In this assignment of error, the defendant claims that the trial court erred in allowing the testimony of unreliable jailhouse snitches in violation of *Messiah* and its progeny and Louisiana Code of Evidence Article 403.

The defendant, in support of his claim, extensively attempts to lay a foundation in order to convince this Honorable Court that neither Thompson nor Elledge, both of whom were in jail at various times with the defendant, should have been allowed to testify. The foundation is nothing more than his own subjective beliefs and/or speculation. The State sees no reason to be as extensive in reply. These witnesses were not agents of the government. (See their trial testimony R.pp. 4342-4385 and 4395-4434 respectively). The defendant-herein cites no Louisiana cases in support of his position.

The jury charge clearly indicates that the trial judge properly advised the jury that the jury itself determines the weight and credibility of the evidence as well as the credibility of the witnesses. He further advised the jury that they would be justified in disregarding testimony should they find that a witness lied to them. (R.p. 675).

The jurors were intelligent individuals who had been accepted by the defendant. Only they know how much weight, if any, the testimonies of Thompkins and Elledge

were given. Whatever the consideration, it was solely within the jury's province.

The probative value of those testimonies far exceeded any prejudicial effect; consequently, the trial judge did not err in allowing either man to testify.

This assignment of error is without merit.

D. EVIDENTIARY AND RELATED TRIAL RULINGS

XIX. In this assignment of error, the defendant alleges that the trial court violated his rights to due process and reliable sentencing when, in the absence of any justification, it allowed the jury to view him in leg irons as he walked across the courtroom to give evidence on his behalf during the sentencing phase.

The defendant cites cases such as *Elledge v. Dugger*, 823 F.2d 1439 (11th Cir. 1987) and *Duckett v. Godinez*, 67 F.3d 734 (9th Cir. 1995) for the proposition that the general rule, providing that a defendant should not be shackled because it is destructive to his presumption of innocence, applies equally to the sentencing phase and the guilt phase of a capital case. It is true that both of these cases stand for that proposition; however, the State respectfully submits that the cases are simply persuasive in nature and the rationale should not be followed by this Honorable Court.

The defendant also cites several Louisiana cases from which he uses a "crane" type analysis. In other words he simply lifts statements from said cases without stating the facts and holding surrounding the reasons for the statements. None of the Louisiana cases deal with a

defendant who was shackled during the sentencing phase of a trial. They concern only defendants who were shackled during the guilt phase. The defendant-herein was also shackled with leg irons during the guilt phase; however, his legs were placed under the table and no juror witnessed the leg irons. Consequently, the only issue before this Honorable Court is the leg irons worn during the sentencing phase.

The only two existing cases known to the state, which address this issue, are *Elledge, supra* and *Duckett, supra*. The State respectfully submits that the rationale of *Elledge* which was followed by *Duckett* is faulty since the United States Supreme Court, as acknowledged by *Elledge* has not heretofore addressed the issue. The *Elledge* court simply stated that the Supreme Court, in *Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986), said nothing that may indicate that the Court did not intend its ruling to apply to the penalty phase of a capital case. (See *Elledge*, footnote 22 at 1451).

The *Holbrook* case dealt only with the guilt phase of that trial and it dealt only with an alleged show of security force by the placement of four uniformed officers on the front row in the courtroom. Although the *Elledge* court is correct in its observation that *Holbrook* said nothing to indicate that it intended that its holding should apply to the penalty phase of a capital case, the Court also said nothing to indicate that it intended that its holding should apply to the penalty phase of a capital case.

This Honorable Court has not, heretofore, addressed the instant issue. The State respectfully directs this

Court's attention to the dissenting opinion in *Elledge, supra,* wherein Edmondson, Circuit Judge, stated:

> "Neither the United States Supreme Court, nor any federal circuit court of appeals has addressed the constitutional impact – if any – of physical restraints imposed on a convicted murdered at the sentencing stage of a bifurcated state trial. *Instead, the case law concerns shackling at the guilt-innocence stage of the trial. The distinction between the two settings is crucial because the single major analytic thrust of all the guilt-innocence phase cases is to determine whether the defendant's right to a presumption of innocence was infringed by the security measure adopted by the trial court.*" Id at p. 1454. (Emphasis added).

The defendant-herein was not entitled to a presumption of innocence once that overriding concern was eliminated.

Prior to the beginning of the penalty phase of the instant trial, an unreported bench conference was held. The court then issued, just prior to the defendant taking the stand, a cautionary instruction to the jury. (R.pp. 4733-4734).

The State-herein respectfully submits that the trial court did not abuse its discretion. The Court was justified in its decision to allow the defendant-herein to appear in leg restraints before the jury during the course of the defendant's testimony in the penalty phase.

As previously stated, the State respectfully requests that this Honorable Court reject the holdings of both the *Elledge* and *Duckett* courts.

XX. In this assignment of error, the defendant alleges that the penalty phase was plagued by improper references to unrelated arrests and other inadmissible, unadjudicated misconduct.

The trial of this case began on July 15, 1991, when *State v. Brooks,* 541 So.2d 801 (La. 1989) was the latest pronouncement of the law and guidelines on admissibility of other crimes in the penalty phase of a capital case. Subsequent to the instant trial, this Honorable Court restricted the type of evidence admissible under *Brooks. State v. Jackson,* 608 So.2d 949 (La. 1992), limited evidence of unadjudicated crimes presented in the penalty phase of a capital trial to crimes which involve violence against the person of the victim and those for which the time limitation for institution of prosecution had not run at the time of the indictment of the accused for the first degree murder for which he is being tried. (See *Jackson* at p. 955).

A. Drug Distribution

The defendant-herein testified on his behalf at the penalty phase. He testified that he was addicted to PCP and, although omitted from his brief, he testified that he had been arrested for PCP. (R.p. 4738). During the course of cross-examination, the prosecutor asked the defendant about the arrest he mentioned on direct. The defendant admitted to an arrest for PCP in 1987 and another 1987 charge of possession of cocaine. (R.p. 4744). He further testified that his addiction to PCP ended in 1986. (R.p. 4749).

The prosecutor also asked the defendant some questions concerning his activity in actually distributing PCP.

The defendant denied ever distributing the drug. During rebuttal the State called Linda Jones. (R.p. 4766). Jones stated that she had been living with the defendant till about 1986. Jones testified that she had seen the defendant selling PCP and that the defendant's source of income was the monies received from the sales. (R.p. 4767). It is from the questions posed to the defendant during cross-examination that he alleges error was committed.

The defendant attacks the foregoing references to drug trafficking on two grounds: (1) *Jackson* limits the admission of evidence of unadjudicated criminal activity to offenses involving "violence against the person of the victim" and (2) evidence of such activity is inadmissible unless "the period of limitation for instituting prosecution had not run at the time of the indictment of the accused for the first degree murder for which he is being tried."

The State shall separately address those grounds. In his first assertion, the defendant states "it is axiomatic that selling or giving away controlled dangerous substances" does not fit within the definition of offenses involving "violence against the person of the victim." Strangely enough, the defendant fails to mention the facts establishing his alleged "axiom".

The State disagrees with the defendant's perception that distribution of controlled substances are victimless crimes or, at most, crimes which do not involve violence against the person of the victim. Any rational person knows that drugs attack the central nervous system of the body. Everyday, through the Dare Program and other

media, our children are taught that such drugs involve violence to the victims who ingest the drugs.

The State's position is buttressed by the fact that our legislature has enacted laws which recognize the violent nature of certain dangerous controlled substances. The instant drug, PCP, is a schedule I drug and the instant drug, cocaine, is a schedule II drug. (See R.S. 14:30.1A(3)) which defines second degree murder as the unlawful distribution of a schedule I or II drug which is the direct cause of the death of the recipient who ingests or consumes such drugs.

It is clear that distribution of such drugs is a crime involving violence against the person of the victim.

In his second assertion, the defendant alleges that the state failed to establish that any prosecutions concerning the drug trafficking activity would not be barred by C.Cr.P. Art. 572.

At the outset, it should be noted that the State did establish, through the testimony of Linda Jones, that the defendant distributed PCP while living with Jones until 1986. The defendant, through his own admissions, established that he possessed PCP as late as 1987 (R.p. 4744) and then later stated that his addiction to PCP ended in 1986. (R.p. 4749). The defendant also admitted to possession of cocaine in 1987. (R.p. 4744).

In 1986, the penalty for distribution of PCP and possession of PCP was imprisonment at hard labor for not more than 10 years. The penalty for possession of cocaine was imprisonment with or without hard labor for not

more than 5 years. The Code of Criminal Procedure Article 572 provides in pertinent part:

> "No person shall be prosecuted, tried or punished for an offense not punishable by death or life imprisonment, unless the prosecution is instituted within the following periods of time after the offense has been committed:
>
> (1) Six years, for a felony necessarily punishable by imprisonment at hard labor;
>
> (2) Four years, for a felony not necessarily punishable by imprisonment at hard labor."

In essence, the prosecution for distribution and possession of PCP was subject to a six year prescriptive period and the possession of cocaine to a four year period. The defendant was indicted in 1988.

Based upon the foregoing, it is clear that the State-herein established that the period of limitation for instituting prosecution for any of these crimes had not run at the time of the defendant's indictment for the instant crime.

The defendant, in footnote 71, alleges that the State cannot defend the admission of this evidence on the basis that it was legitimate rebuttal because it was the State, not the defendant, who initially brought up the issue of drug trafficking.

The State disagrees! It was the defendant who "opened the door" regarding the drugs. The State simply attempted to clarify matters that the defendant himself placed before the jury.

The offenses of distribution were unadjudicated crimes that met the criteria set forth in *Jackson*. For that reason, and for the reason that the defendant "opened the door", reference to said offenses was permissible.

B. Prior Arrests

The defendant complains that the prosecutor asked him about prior arrests. Undeniably, the prosecutor did question the defendant regarding prior arrests; however, the defendant, as previously stated, "opened the door" to said questioning. The defendant did so in an attempt to set up an explanation for his past violent actions; for instance, the testimony of a doctor, in order to explain his self imposed diagnosis of "brain damage" due to extensive former usage of various drugs.

The questioning was proper. The defendant should not now be heard to complain. Further, the defendant did not object nor complain about this issue during the course of the trial. A new ground for objection cannot be presented for the first time on appeal. *State v. Cressy*, 440 So.2d 141 (La. 1983); C.Cr.P. Art. 841.

C. The California Conviction

The defendant alleges that the State introduced evidence of the original charge even though he pled guilty to a lesser offense. He argues that the cases cited by him, *State v. Jackson*, 93-0001 (La. 11/30/94); 648 So.2d 1272, *State v. Langley*, 94-0999 (La. 4/21/94); 639 So.2d 211; and *State v. Durham*, 94-0534 (La. 3/18/94); 634 So.2d 848. The State disagrees. Each of the cited cases directly deal with

situations in which the defendants did indeed plead to a lesser offense than that with which they were originally charged. That is not the case here!

The defendant-herein was originally charged with two felony counts in a single indictment. Count one was robbery and count two was assault with a deadly weapon, a felony pursuant to California Penal Code, Section 245. He subsequently pled guilty to count two and count one was dismissed. He pled guilty to one of the actual crimes with which he was charged.

Harmless error

The State-herein submits that should this Honorable Court find that one or more of the instant other unrelated crimes should not have been admitted, said admission was harmless error. The inquiry is whether the capital sentence "actually rendered in this trial was surely unattributable to the error." *State v. Code*, 627 So.2d 1373, 1384 (La. 1993), *cert. denied*, 114 S.Ct. 1870, 128 L.Ed.2d 491 (1994), quoting *Sullivan v. Louisiana*, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); *State v. Tart*, 93-0772 (La. 2/9/96).

Based upon the previous arguments set forth herein and the evidence in this case as a whole, the capital sentence rendered by the jury in this case was surely unattributable to any error.

This assignment of error is without merit.

XXI. In this assignment of error the defendant alleges that the prosecutor improperly impeached one of Appellant's penalty phase witnesses by confronting her with out of court statements which, over her repeated

denials, the prosecutor insisted that she had made to him. The jury was not instructed that this evidence was not substantive proof.

The defendant-herein misstates the facts. A review of the colloquy between witness English and the prosecutor reveals that the prosecutor never, as stated by the defendant, insisted that English made such statements.

The questions asked of this witness were nothing more than proper impeachment and were directed to the witness in response to the questions asked of her on direct and her responses to those questions. (R.p. 4731). Those questions and responses on direct were as follows:

Q. Ma'am, have you . . . Have you, yourself, or any member of your family been afraid or been threatened by Mr. Divers through this?

A. No.

Q. Your answer is no?

A. No. Afraid of him?

Q. Yes Ma'am. Afraid of him.

A. No.

Q. Has he threatened you or any member of your family?

A. No.

The defendant cites several cases; however, none of them support his allegations. He even cites cases dealing with the prohibition of a prosecutor's reference to conduct not admitted at trial. Those cases deal solely with argument of counsel. The questions asked of witness English were asked during trial.

This assignment of error is without merit.

XXII. In this assignment of error the defendant alleges that he was denied due process and reliable capital sentencing by the opinion testimony of a Los Angeles deputy concerning Appellant's California conviction. Specifically, he contests the deputy's use of the word brutal when describing the conduct of the defendant.

The defendant again uses the word "axiomatic" in the context of stating that lay witnesses are not qualified to give opinion testimony. Again, he fails to support that alleged axiom.

La. Code Ev. Art. 701 provides:

> If a witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are:
>
> (1) Rationally based on the perception of the witness; and
>
> (2) helpful to a clear understanding of his testimony or the determination of a fact in issue.

It is clear that the deputy's description of the crime was based upon firsthand knowledge and was helpful to a clear understanding of his testimony.

This assignment of error is without merit.

XXIII. In this assignment of error the defendant alleges that he was denied due process and reliable capital sentencing by the admission of improper evidence and lay opinion testimony during the guilt phase.

The "objected to" statements in reference to this assignment of error were clearly permissible pursuant to La. C. Ev. Art. 701. They were rationally based upon the perception of the witnesses. Elledge listened to the defendant and based upon his own knowledge he did not believe the defendant. It was not error for Det. Toney to give his opinion about whether he believed the defendant. Further, Toney, contrary to defendant's assertion, never testified that he found no exculpatory evidence. The defendant's objections were sustained. (R.pp. 4509-4510).

Finally, the jury heard all of the evidence in context. They made the credibility call regarding all of that evidence. This assignment is without merit.

XXIV. In this assignment of error the defendant alleges that both phases of his trial were infested with hearsay evidence which operated to violate his state and federal rights to confront the witnesses against him.

The defendant claims that the following testimony of witness Elledge was hearsay:

> "Well, he [defendant] started telling me that the only evidence they had against him was his cousin's twenty-eight page statement, . . . "

The defendant's contention is misplaced. Although the testimony eluded to the defendant's cousin's statement to the police, the testimony consisted of a statement made by the defendant and offered against him in trial. Pursuant to La. C. Ev. Art. 801D(2)(a), the statement was not hearsay. *State v. Walters*, 25587 (La. App. 2d Cir. 1994) 630 So.2d 1271.

The defendant alleges that a Dallas detective should not have been allowed to testify that the Texas plates found on the Dodge Shadow were stolen. The State disagrees with the defendant.

The trial court allowed the testimony pursuant to La. C. Ev. Art. 803(8). The State respectfully submits that the trial court did not abuse its discretion. Should the Honorable Court find that said testimony should not have been allowed, the State respectfully submits that, in light of all the evidence in this case, said admission was harmless and surely "the capital sentence rendered by the jury in this case was . . . unattributable to this error." *State v. Sanders*, 93-0001 (La. 11/30/94) 648 So.2d 1272.

The defendant also argues that Det. Toney was allowed to testify about out of court statements of victim Vandervield's relatives. (R.p. 4461). A review of that testimony reveals that Toney was simply asked if he confirmed certain information through a relative and Toney answered in the affirmative. He never testified regarding what the relative actually stated to him. Notwithstanding that observation, the testimony was merely cumulative since Diana Ballard, Vandervield's sister, had earlier testified concerning like matters. (R.pp. 3693-3753).

Defendant further complains alleging that Toney testified about information concerning the defendant's brother (R.p. 4478) and statements of Annie Benton's connection to the Dodge Shadow. (R.p. 4481).

The record reveals that the information concerning the defendant's brother was nothing more than Toney's means of establishing the defendant's true identity. The record also reveals that Toney was not allowed to testify

concerning statements made to him by Annie Benton. (R.pp. 4479-80).

This assignment of error is without merit.

XXV. In this assignment of error, the defendant alleges that the trial judge deprived the defendant of his right to confront his accusers and to present a defense by curtailing his cross-examination of snitch Thompkins.

A review of the record reveals that the defendant was not "reined in" as he alleges. The transcript of the cross-examination of Thompkins covers approximately 30 pages. The defendant virtually turned Thompkins "every which way but loose." He had a thorough opportunity to cross-examine Thompkins and his attorney did a thorough job.

This assignment of error is without merit.

XXVI. In this assignment of error, the defendant alleges that the State improperly adduced evidence of the victim's pious ways and good character traits at the guilt phase.

The defendant, in the substantive portion of his brief, cited *State v. Payton*, 361 So.2d 866, 871 (La. 1978) for the proposition that the State could not introduce victim impact evidence in the guilt phase of a trial. *Payton* has absolutely nothing to do with such a holding. *Payton* dealt with the constitutionality of the various statutes and/or articles pertaining to first degree murder. He also cites, in a footnote, *State v. Smith*, 544 So.2d 676 for the proposition that a capital murder conviction was reversed because the prosecutor injected extraneous issues into trial. Again the defendant used an improper cite. Page

676 of 544 So.2d series contains a case entitled *State, DOTD v. Dietrich,* which is cited at 544 So.2d 675 (La. App. 3 Cir. 1989).

The defendant specifically argues that the testimony of Cheryl Bell (R.pp. 3662-63), the victim's sister (R.pp. 3669-50) and victim Vandervield's mother, should not have been admitted.

A close review of Bell's testimony clearly indicates that the purpose of the testimony was to establish an approximate time of death. In other words, Vandervield was always punctual in arriving at work and had not missed work. When Bell realized that Vandervield had missed work, it was highly unusual and she inquired of his family members.

The purpose of Vandervield's sister's testimony was the same, to establish that he was alive on one day, then missed work, and finally was discovered murdered. Further, the sister's testimony and mother's testimony were elicited for the purpose of attempting to establish the existence of money and/or other valuables that may have been in Vandervield's home and later discovered missing. (To establish motive). The testimony of all witnesses was relevant to the defendant's guilt or innocence.

The defendant also complains that the State argued the instant testimony in closing. (R.p. 4646). A thorough review of the prosecutor's summation clearly proves the reason, as previously stated herein, for the testimony.

"Indeed, some facts about the victim, including some personal characteristics, are frequently developed at the

guilt phase of the trial . . . " *State v. Bernard*, 608 So.2d 966, 971 (La. 1992).

The instant testimony was relevant and admissible. This assignment of error is without merit.

XXVII. In this assignment of error, the defendant alleges that the State presented inadmissible other crimes evidence in the guilt phase.

Specifically, the defendant argues that the State should not have been allowed to adduce evidence: 1) that when located, Vandervield's car had defendant's stolen license plate mounted on the rear and another stolen plate inside of the vehicle; 2) concerning the use of an alias by the defendant; and 3) certain statements attributed to the defendant.

The State set forth its argument for admission of the stolen plates (R.p. 3994) and, at this time, contends that said reason was justifiable and the trial court did not abuse its discretion in overruling the defendant's objection.

The State respectfully submits that evidence of the stolen plates concerned res gestae events. In this respect, this Honorable Court has stated:

> "The general prohibition against the use of other crimes evidence does not ban admission of criminal acts which are an inseparable part of the whole deed . . . In Louisiana, such acts are denominated as part of the res gestae and admitted under the authority of La. R.S. 15:447-48. [Now see L.C.Ev. Art. 404B(1)]. A very close connexity between the charged offense and the other crimes evidence sought to

> be introduced under the res gestae exception is required. [citation omitted]. This close connexity in time and location is essential to the exception because *no notice of the State's intention to introduce evidence of offenses which are* part of the res gestae is required. See La.C.Cr.P. Art. 720; *State v. Prieur*, 277 So.2d 126 (La. 1973). . . .
>
> This court has approved the admission of other crimes evidence when it is related and intertwined with the charged offense to such an extent that the state could not have accurately presented its case without reference to it. (citations omitted).
>
> In such cases, the purpose served by admission of other crimes evidence is not to depict the defendant as a bad man, but rather to complete the story of the crime on trial by proving its immediate context of happenings near in time and place." (Emphasis added). *State v. Haarala*, 398 So.2d 1093 (La. 1981).

The reference to Jesse Divers, the alias, was simply to show that a Jesse Divers had a record. The defendant's brother's name was Jesse. That statement and any reference to other statements attributed to the defendant, were properly admitted pursuant to La. C.Ev. Art. 801D(2)(a).

This assignment of error is without merit.

XXVIII. In this assignment of error, the defendant alleges that the State's evidence was constitutionally insufficient to support his conviction and death sentence.

Specifically, the defendant argues that since there were no "eye-witnesses" to the crime, the evidence was insufficient. The defendant condemns Thompkins' and Elledge's testimony as unbelievable, and there was no

other witness to put the defendant at the scene of the crime.

The defendant, however, conveniently omits reference to the testimony of experts who specifically identify the defendant's fingerprints on beer cans and bottles located inside 1403 Mississippi Street, and the testimony of an expert concerning shoeprints located inside the carport at 1403 Mississippi Street.

Evidence is sufficient to support a conviction when any rational trier of fact, in viewing the evidence in the light most favorable to the prosecution could have concluded that the essential elements of the crime were proved beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2871, 61 L.Ed. 560 (1979).

In an attempt not to belabor the point, the State presented evidence that the defendant had indeed been inside victim Vandervield's home although the defendant denied ever being there (fingerprints and shoe prints). Statements made by the defendant to police and others were introduced. And the defendant had possession of Vandervield's Dodge Shadow as early as one day after Vandervield's death. The defendant also had possession of Vandervield's jacket.

Considering the foregoing, viewing the evidence in the light most favorable to the prosecution, the evidence is sufficient to support the jury's verdict of guilty as charged.

The defendant, in one sentence, alleges that his death sentence was disproportionate to the level of his culpability to this crime, and two other crimes. The State

submits that the punishment received is proportionate when compared to all other cases in the Fourth Judicial District Court. (See State's Sentence Review Memorandum).

E. ISSUES CONCERNING ARGUMENT, INSTRUCTIONS AND VERDICT

XXIX. In this assignment of error, the defendant alleges that the guilt phase instructions were erroneous and mandate reversal.

(a) Trial court's failure to instruct the jury to determine if statements were freely and voluntarily given.

The defendant first alleges that the trial court's failure to charge the jury on their need to evaluate the voluntariness of the defendant's several statements was error. It is true that the trial court did not give the defendant's requested instruction. The reason is that the court felt there was a distinction between a confession and/or admission to the police and one made to persons who were not "state actors." As the trial judge correctly stated, the defendant's statements to police were not inculpatory. In other words, they were not the types of statements that were acknowledgments of guilt or tended to establish guilt. (R.pp. 4640-41).

The defendant cites *State v. Martin*, 94-252 (La. App. 5 Cir. 10/12/94) 645 So.2d 752, 754, in an attempt to support its position. *Martin* did not address this issue. It was not a jury instruction case. *Martin* dealt solely with a

motion to suppress the issue. Motions to suppress had earlier been heard in the instant case.

The general charge by the instant trial court was as follows:

> "In deliberating upon the facts, you jurors alone shall determine the weight and credibility of the evidence as well as the credibility of the witnesses as you are impressed with their truthfulness or lack of truthfulness. In considering the credibility of the witnesses, you may take into account the manner or demeanor of the witness on the stand, the probability of his or her statement, the interest he or she may have in the case and every other circumstance surrounding the giving of his or her testimony which may aid you in weighing his or her statements.
>
> If you believe that any witness in the case, either for the state or for the defense, has willfully and deliberately testified falsely to any material fact, then I charge you that you are justified in disregarding the entire testimony of such a witness, if there is one, as proving nothing and as unworthy of belief. To state this rule another way, you as jurors have the right to accept as true, or reject as untrue, the testimony of any witness." (R.p. 675).

Further, the officers, during trial, were extensively questioned regarding the circumstances surrounding the statements made to the police. (R.pp. 4240-55). (Also see rights forms introduced as S-200 and S-201).

The State respectfully submits that the instructions, when viewed as a whole, adequately guided the jury's

determination of all witnesses' testimony regarding statements made by the defendant.

b. Argument concerning the terminology "you may infer that the defendant intended the nature and probable consequences of his act."

The defendant next alleges that the court erred in giving a version of the "Sandstrom" instruction: The State respectfully submits that the instruction given by the instant trial court, is not prohibited by *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

In the guilt-phase jury charge, after reading the definitions of both general and specific intent, the trial judge gave the following instruction:

> "Intent is a condition of the mind, and rarely can be proved except circumstantially. One cannot see, feel, hear or touch intent. One's intent in the doing of any particular act is usually arrived at by a process of deduction and inference. It is usually proved by the sum total of the acts or conduct joined with, or part of transaction having as its goal the achievement of a particular purpose. You may infer that a defendant intended the natural and probable consequences of his acts." (R.p. 678).

The instant charge was taken straight from the Louisiana Judge's Criminal Bench Book, Sec. 4.01. The State submits that the instruction does not "tell" the jury that a defendant intends the natural consequences of his acts. It merely instructs the jury that it may "infer".

The trial court properly instructed the instant jury that it "may infer" intent. (See *State v. Tart*, 93-0772 (La. 2/9/96); 1996 WL 55944, assignment of error number 16 in which the Honorable Court upheld the identical charge.)

c. Alleged "acquittal first" instruction.

The defendant next argues that the trial court gave an alleged "acquittal first" instruction which required the jury to acquit the accused of first degree murder prior to moving on the responsive verdicts. The defendant claims this to be error on the part of the trial court. (R.p. 680).

The identical instruction given in this case was reviewed in *State v. Sanders*, 93-0001 (La. 11/30/94), 648 So.2d 1272, 1279. This Honorable Court approved of the instruction given in *Sanders*. That reasoning is still valid and is equally applicable in the instant case.

d. Principle liability instruction.

The defendant next contends that the jury instruction regarding "principals" should not have been given at all and that it permitted the jury to convict the defendant in the absence of a finding that he possessed specific intent to kill.

In support of his contention, the defendant argues that the first degree murder instruction given by the court did not specify that the jury was obligated to find that this defendant had the requisite specific intent. The State disagrees!

The definition of first degree murder given in this case is located at page 678 of the record. The trial court instructed the jury verbatim from R.S. 14:30 and the applicable subsections thereof. When defining both subsections (1) and (3) the court began with the words "when the *offender* has the specific intent to kill or inflict great bodily harm." (Emphasis added).

It is true that the trial court gave the definition of "principals" to the jury; however, that fact alone, does not square with the defendant's contention. The defendant had to be a principal or an accessory after the fact since there are only two classes of "parties" to crimes in this state. (See R.S. 14:23). If a person is not one or the other, the person cannot be culpable of a crime.

All of the evidence adduced by the state during the course of the trial was directed solely at convincing the jury that the defendant himself was the actual perpetrator or offender (to use the words of R.S. 14:30). Therefore, the instant jury could not have convicted the defendant-herein without a finding that *he* possessed the specific intent to kill or inflict great bodily harm.

State v. Holmes, 388 So.2d 722 (La. 1980) cited by the defense is distinguishable from the facts of the instant case. The prosecutor in *Holmes*, while giving a hypothetical situation during voir dire, made a misstatement of the law and actually told the jury that when three people plan a robbery, one stays at an apartment, one remains in the car, and the third commits the robbery and kills the teller, the person in the apartment and the person in the car are guilty of murder.

The foregoing did not happen in the instant case. The prosecutor never urged the notion that this defendant could be convicted on the principal theory without a finding that he himself had the requisite intent. The trial judge did not do so either.

The defendant's contention is misplaced when placed in the context of the instant trial.

e. Alleged duplitious instructions which allegedly promoted nonunanimous verdict.

The defendant also contends the applicable jury instruction defining first degree murder allowed convictions on any of the five different theories of culpability. He alleges that the indictment itself disjunctively charges a crime and such disjunctive charging is prohibited. In other words, he contends there can be no confidence that twelve jurors unanimously believed the defendant guilty under the same theory of culpability. The State-herein disagrees. The charging was conjunctive not disjunctive.

La.C.Cr.P. Art. 480 provides:

> "If an offense may be committed by doing one or more of several acts, or by one or more of several means, or with one or more of several intents, or with one or more of several results, two or more of such acts, means, intents, or results may be charged conjunctively in a single count of an indictment, or set forth conjunctively in a bill of particulars, and proof of any one of the acts, means, intents, or results so charged or set forth will support a conviction."

This Honorable Court approved a similar sequential instruction in *State v. Sanders*, 93-0001 (La. 11/30/94), 648 So.2d 1272 and again approved of the same instruction in *State v. Tart*, 93-0772 (La. 2/9/96), 1996 WL 55944.

f. The defendant contends that the flight instruction should not have been given.

The defendant contends that the instant facts contained no evidence of flight and the instruction violates the principles of *Sandstrom, supra*. His argument with respect to the lack of evidence is premised upon the fact that he had been living in Dallas before the offense occurred.

There was sufficient evidence from which a jury could reasonably infer that the defendant fled this jurisdiction immediately after the crime. He committed the crime then returned to Dallas. It is of no significance that he lived in Dallas prior to the time the instant murders were committed.

The flight instruction did not violate the principles of *Sandstrom* which prohibits impermissible presumptions concerning the ordinary consequences of one's voluntary acts.

Although dealing with an issue of comment upon the evidence, this Honorable court approved the following "flight" instruction in *State v. White*, 329 So.2d 738 (La. 1976):

> "Now, I will also instruct you that flight, if established by the evidence, is a circumstance which may tend to prove guilt in some cases and which may be considered by the jury together with all other evidence. You may give it whatever weight, if any, that appears to be

> proper in considering it together with all of the other evidence and circumstances in the case." Id. at p. 741.

Also, a jury instruction identical to the instant instruction was approved in *State v. Hosford*, 572 So.2d 242 (La. App. 1 Cir. 1990) citing *White, supra.*

g. Conclusion

The defendant's due process rights were not violated. This assignment of error is without merit.

XXX. In this assignment of error, the defendant submits several reasons why he contends that the penalty phase instructions were erroneous and require reversal.

a. The jury was instructed that second degree kidnapping was a statutory aggravating factor.

The defendant specifically argues that it was error for the trial court to instruct the jury that second degree kidnapping was an aggravating factor. The defendant is incorrect. Although the jury instruction in the record, at page 691, reflects the crime of second degree kidnapping was listed as an aggravating circumstance, the trial court did not instruct the jury that the crime was an aggravating factor they could consider.

The statutory aggravating factors given to the jury during oral instructions and the aggravating and mitigating circumstances given by the court to the jury for their consideration during deliberations is found at page 772 of the record.

During the course of preparing to respond to this issue, this writer vaguely remembered having mentioned to the trial court, prior to the court instructing the jury, that second degree kidnapping, although an element of first degree murder, was not listed as an aggravating factor in C.Cr.P. Art. 905.4(A)(1).

This writer thoroughly checked the record and did not locate a transcript of the trial court's penalty phase instructions to the jury. Evidently, it was not transcribed.

This writer then asked the paralegal at this office to go the Fourth Judicial District Court Reporter's Office and listen to a tape of the penalty phase of the jury instructions. The paralegal did so and learned that, as suspected, the trial court, when instructing the jury, never mentioned the crime of second degree kidnaping.

Since the court did not mention the crime as the defendant contends, the State respectfully requests that this Honorable Court order the Fourth Judicial District Court Reporter to transcribe the penalty phase instructions and supplement the record accordingly.

At this point, the State feels that it should comment upon the language and accusations made toward the trial court in this assignment. The defense counsel, on page 176 of his brief, accused the trial court of being *"intolerably sloppy"* in its preparation of instructions.

The State respectfully submits that the language and accusation are direct violations of Louisiana Supreme Court Rule VII, Section 7, which clearly states that "the language used in any brief or document filed in this court

must be courteous, and free from insulting criticism . . . of any person . . . or of any court of justice."

This writer feels that this violation should be ordered stricken from defendant's brief and it should not go unnoticed.

b. Defendant's contention regarding failure of instructions to define aggravating factors in penalty phase.

The defendant next argues that it was constitutional error for the trial court to fail to list the elements for any of the felonies concerning aggravating factors in the penalty phase.

In *State v. Davis*, 92-1632 (La. 5/23/94), 637 So.2d 1012, this Honorable Court addressed a similar issue. The *Davis* defendant alleged that evidence of certain aggravating circumstances was nonexistent. This Honorable Court held:

> "the failure of one statutory aggravating circumstance does not invalidate a death penalty if another aggravating circumstance is supported by the evidence, so long as the evidence offered in support of the arguably unproven circumstance did not inject an arbitrary factor into the proceedings." Id. at p. 1030.

The same rationale is equally applicable to the instant case. Assume, for the sake of argument only, that the defendant's contention that the trial court should have once again, at the penalty phase, redefined each crime used as an aggravating factor, the instant finding of the offender knowingly created a risk of death or great bodily

harm to more than one person, would, pursuant to *Davis*, be sufficient to affirm a sentence of death.

The defendant-herein actually premises his contention upon his argument in paragraph (a) of this assignment of error. As the state has pointed out, that argument is unfounded since the trial court did not charge the jury that second degree kidnaping was an aggravating circumstance.

The State further contends that the trial court was not required to re-define the crimes of armed robbery or first degree robbery because the trial court had previously done so in the guilt phase. The jury in the penalty phase was the same jury which had just been instructed in the guilt phase. (See *State v. Tart, supra*, where this Honorable Court reasoned that a jury instruction in the guilt phase was sufficient to assist the same jury in the penalty phase.) (*Tart* at assignment of error No. 19).

c. Contention that the jury's finding that the defendant was engaged in the perpetration of armed robbery and simple robbery violated his right to not be subject to double jeopardy.

This contention makes no sense. The jury, when rendering the verdict, simply used the conjunctive "and" rather than the disjunctive "or". It makes no difference for constitutionality purposes, based upon the same argument advanced by the State in subsection (b) of this assignment of error.

Further, assuming for the sake of argument only, the defendant was correct and the jury had decided the

defendant had committed both armed *and* simple robbery. Such a finding would not invalidate, as previously stated, the factor of creating a risk to more than one person, nor would it invalidate the finding of perpetration of armed robbery. At the very least, the simple robbery would merge into the armed robbery and the armed robbery would be a valid aggravating circumstance.

The foregoing analysis is similar to that used by the courts when a defendant has been convicted of two crimes, one of which is actually an element of the other. Both convictions do not fall. The courts simply hold that "where multiple punishment has been erroneously imposed the proper appellate procedure is to eliminate the effect of the less severely punishable offense." *State v. Doughty*, 379 So.2d 1088 (La. 1980); *State v. Cotten*, 438 So.2d 1156 (La. App. 1 Cir. 1983) citing *Doughty, supra.*

d. Contention concerning the jury not being instructed as to the scope of its life option.

The defendant next contends that the jury was never informed that they could impose a life sentence even if there was an aggravating circumstance and no mitigating factors.

The record belies this claim. The trial court instructed the jury "[t]he finding of an aggravating circumstances does not mean that you must impose the death penalty." (R.pp. 691-92); *State v. Tart*, 93-0772 (La. 2/9/96); 1996 WL 55944 at assignment of error no. 19.

e. Contention that the trial court erred in instructing the jury that its sentencing verdict was merely a recommendation.

The defendant contends that the trial court erred in instructing the jury that its sentencing verdict was merely a recommendation, which diminished the jury's feeling of ultimate responsibility for its sentence. In other words, the instruction led the jury to believe that the court would make the final decision regarding the sentence.

The record belies this claim. The trial court told the jurors "[y]ou must now decide whether the defendant should be sentenced to death or life imprisonment without benefit of probation, parole or suspension of sentence" and [i]n reaching your decision regarding the sentence to be imposed . . . " (R.p. 691). Such statements were made throughout the instruction: "[b]efore you decide that a sentence of death should be imposed . . . " (R.p. 691); "[i]n the event you unanimously decide the death penalty should be imposed . . . ," [i]f the jury decides that a life sentence . . . should be imposed. . . . " (R.p. 693). The verdict form states:

> "Having found the below listed statutory aggravating circumstance or circumstances and after consideration of the mitigating circumstances offered, the jury unanimously determines that the defendant be sentenced to death." (R.p. 690).

No juror could have failed to appreciate the nature and gravity of the jury's death penalty decision. See *State v. Tart*, 93-0772 (La. 2/9/96); 1996 WL 55944, in assignment of error no. 19 which this Honorable Court

addressed this identical claim. The State's instant response tracks the Court's decision in *Tart*.

f. Contention that to instruct the jury on the entire list of mitigating circumstances at the behest of the prosecution serves only to designate the importance of mitigating evidence.

Frankly, the State really doesn't understand this contention. The State did not request that the court instruct on all mitigating circumstances and it defies logic to believe that the State would ever do so.

The defendant is actually stating a rule of law that he wishes to exist. He argues that the State should not be allowed to argue the nonexistence of irrelevant mitigating circumstances. In the instant case, the State did not do so. (R.pp. 4768-69).

This contention is not based on any facts found in this record.

g. Contention that the court failed to instruct the jurors that they should consider evidence in mitigation individually.

The defendant argues that the trial court's instructions failed to provide adequate guidance to the jury. on how to consider the evidence in mitigation. For instance, the defendant contends that the trial court failed to tell the jurors that they were not required to be unanimous in the consideration of mitigating factors yet the court used the word unanimous which, allegedly, likely impled a requirement of unanimity on all findings.

The State-herein adopts the reasoning of *State v. Tart*, 93-0772 (La. 2/9/96); 1996 WL 55944 as its response. That reasoning is as follows and is found in *Tart* at assignment of error no. 19:

> "The record shows that the trial court read the list of statutory mitigating circumstances to the jury which includes as a definition 'any other relevant mitigating evidence.' The trial court went on to instruct:
>
> However, in addition to those specifically provided mitigating circumstances, you must also consider any other relevant mitigating circumstances which are defined. You may consider any other relevant circumstances which you feel should mitigate the severity of the penalty to be imposed. (R.p. 692).
>
> The trial court gave the jurors a copy of the statutory mitigating factors before the deliberation. In *State v. Flowers*, 441 So.2d 707 (La. 1983), *cert. denied*, 466 U.S. 945, 104 S.Ct. 1931, 80 L.Ed.2d 476 (1984), the trial court did likewise. In response to the argument that the trial court failed to explain statutory mitigating circumstances and their function in the jurors' deliberations, this court disapproved any further instruction. 'Any further attempt to define or expand upon statutory mitigating circumstances may only lead to juror confusion and further efforts to define the definitions.' Id. At p. 441 So.2d at p. 716. A fair reading of the instructions does not suggest a requirement of unanimity in consideration of a mitigating factor."

h. Contention the jury was never given any guidance as to how it should find mitigating circumstances.

The defendant's contention, in plain language, is that since the court instructed the jury that it had to find the existence of any aggravating circumstance beyond a reasonable doubt and since the court did not instruct as to the burden of proof on mitigating circumstances, it is reasonable to assume that the jury might believe that it had to apply the reasonable doubt standard to the mitigating circumstances.

In the guilt phase instructions, the trial court instructed the jury that the burden of proof of beyond a reasonable doubt was upon the State. (R.pp. 673-74). At no time did the trial court ever use the reasonable doubt standard in such a way that a reasonable juror may conclude that the burden was somehow shifted to the defendant with regard to mitigating circumstances.

There are no facts in the record to substantiate the instant contention. It is merely speculative and nothing more.

i. Alleged problems with the verdict forms.

The defendant appears to argue that he should have received two death sentences. He claims that it is not clear which murder resulted in the verdict and his judgment of execution.

It is clear that the death of both victims resulted in the verdict since the defendant was found guilty as charged on both counts. (See indictment at R.p. 71 and

verdict R.p. 685). The verdict expressly states count 1 – Winston Vandervield and count 2 – Simmie Stevenson.

It is just as clear that the death of both victims resulted in the judgment. The judgment expressly states "having been charged by bill of indictment, with two (2) counts of first degree murder." It is respectfully submitted that those documents serve as ample notice to the defendant.

If this was error, it could be cured by this Honorable Court remanding the case to the trial court for the imposition of two death sentences.

j. Conclusion

The defendant argues that viewed singly or collectively, the instructional errors outlined above violated his rights to due process, an impartial jury and reliable capital sentencing.

The State submits that for the reasons outlined above, the defendant's rights were adequately protected. This assignment of error is without merit.

XXXI. In this assignment of error, the defendant urges several alleged reasons the prosecutor committed reversible error during the guilt phase of closing argument: (1) when she allegedly misrepresented evidence; (2) when she allegedly vouched for her own witness; and (3) when she allegedly referred to "facts" not in evidence.

Specifically, defendant claims that the prosecutor repeatedly tried, unsuccessfully to elicit testimony that (1) Simmie Stevenson was placed in the trunk of his car; (2) there was a hood placed over Stevenson's face: (3)

Diane Ballard could positively identify ties used to bind Vandervield as having belonged to him; (4) Thurston Mayfield was at 1403 Mississippi Street one and a half weeks prior to the homicides, yet left no prints. Allegedly, when she didn't get the answer she wanted, she misstated the evidence.

First the State will address Stevenson in the trunk. The defendant argues that the ADA tried to get the FBI agent, who testified to blood types, to confirm that Stevenson was in the trunk. When the ADA could not, she simply argued that he did so confirm and that argument was improper. The agents pertinent testimony is found in the record at 4116-19 and the prosecutor's argument is found at R.p. 4665. A review of the pertinent record reveals that the prosecution was simply drawing an inference from what she believed the evidence proved.

Second, the defendant makes the same argument regarding a hood on Stevenson's body. Major Davis, the witness, testified that the instant red object was used to cover Stevenson's head and as a gag. (R.p. 3798, l. 15). In closing the ADA simply argued her conclusion that the red object was a hood. (R.p. 4652).

Next, the defendant claims that the prosecutor improperly argued that Diane Ballard positively identified ties when in fact she did not. Ballard's pertinent testimony is found at R.pp. 3724-35. The prosecutor's comments are at R.pp. 4647-48). The prosecutor did say that Ballard was sure some of the ties were Vandervield's ties. Ballard actually stated that the ties looked like Vandervield's ties. The argument was not improper. The prosecutor was simply arguing from her memory of the facts.

Finally, the defendant claims Diane Ballard testified that she had seen her cousin, Thurston Mayfield, in Monroe approximately one and a half weeks prior to the murders, yet the prosecutor argued that Mayfield had actually been in Vandervield's apartment. Ballard's testimony is found at R.pp. 4533-35 and the prosecutor's remarks are at R.pp. 4675-76.

When the prosecutor made her initial remark about Vandervield being in the house, the defense objected and was overruled. Notwithstanding the court's ruling, the prosecutor stated:

> *"You will have to jog your memories.* My notes indicate that she testified Thurston Mayfield had been there about a week and a half before and when he left he went back to Texas." *You jog your memories.* (R.p. 4676).

It is clear the prosecutor is arguing from memory; however, she in essence, is telling the jury to rely on their memories if their recollection is different.

"Counsel are permitted in argument to make fair and reasonable conclusions from facts in evidence." *State v. Clark,* 387 So.2d 1124.

"While a prosecutor must base his conclusions and deductions upon the evidence adduced at trial under Article 774, both the state and defense are entitled to their own conclusions as to what is established by the evidence. Moreover, a conviction [should] not be reversed because of improper closing argument, unless the remarks influenced the jury and contributed to the verdict." *State v. Hilburn,* 625 So.2d 235 (La. App. 2d Cir.

1993), citing *State v. Mills*, 505 So.2d 933 (La. App. 2d Cir. 1987), writ denied, 508 So.2d 65 (La. 1987).

The record, as a whole indicates that the prosecutor simply engaged in proper argument. Moreover, the defendant simply "pick-out" minor details in the whole scheme of the trial.

Further, even assuming the remarks were improper, the defendant, other than making allegations, has failed to show that the remarks influenced the jury and contributed to the verdict.

Contention that prosecutor improperly bolstered the state's witnesses while accusing the defendant and defense counsel of being liars.

This contention is far reaching and is nothing more than a deliberate outright attack on the ethics of the prosecutor. Stating that someone is not manufacturing evidence is nothing more than pointing out that the witnesses were simply stating what they knew and nothing more.

Further, the reference to "smoke screen" when describing defense argument was found to be proper argument by one of our state appellate courts. In *State v. McNeil*, 613 So.2d 752 (La. App. 4 Cir. 1993), the court, when addressing the state's rebuttal argument that the defense was trying to create a "smoke screen", stated that [t]he jury could only have properly concluded that this was nothing more than the State's opinion of the evidence.

The defendant's contention has no substance. The prosecutor's remarks were proper when placed in the

context of the entire closing argument and its reflection upon the evidence.

Defendant's contentions that the prosecutor went outside the record to make improper, inflammatory and entirely unsupported remarks concerning the circumstances of the crime.

The remarks alluded to by the defendant are the prosecutor's remarks concerning "someone drinking beer" (R.p. 4655); "They like to shoot them in the head" (R.p. 4676); "Man wearing a coat so he wouldn't get blood on him" (R.p. 4702); "pools of blood" (R.p. 4664); "smoking in the car" which was based on fact that Vandervield did not smoke and cigarettes were found in the car (R.p. 4663); Vandervield being an ideal employee which was made simply to show that he was punctual to work, he didn't arrive at work and to establish date of death. (R.p. 4646).

All of those remarks were proper. The defendant's prints were on beer cans. The victims were shot in the head. There was a great deal of blood. Vandervield did not smoke, but someone did and the date of the offense had to be established.

Contention that the prosecutor misstated the law.

The defendant claims that the prosecutor misstated the law on specific intent by telling the jury "if you put a gun, a loaded gun, to someone's head, pull the trigger and watch the bullet go in, you have a specific intent to inflict great bodily harm." (R.p. 4643). The defendant

alleges that statement advanced the notion that specific intent can be presumed.

The State submits that the statement did nothing of the kind. It was simply an inference drawn from the evidence and was proper in its form.

Even if the statement were improper, it would not be reversible error under the facts of this case. This Honorable Court has held:

> "a prosecutor's misstatements of the law during voir dire examination, or in his opening and closing remarks, do not require reversal of a defendant's conviction if the court properly charges the jury at the close of the case." *State v. Cavazos*, 610 So.2d 127, 128-129 (La. 1992); *State v. Tart*, 93-0772 (La. 2/9/96); 1996 WL 55944, at assignment of error no. 16.

In his guilt phase jury charge, after reading the definitions of both general and specific intent, the trial court stated:

> "Intent is a condition of the mind, and rarely can be proved except circumstantially. One cannot see, feel, hear or touch intent. One's intent in the doing of any particular act is usually arrived at by a process of deduction and inference. It is usually proved by the sum total of the acts or conduct joined with, or part of transaction having as its goal the achievement of a particular purpose. You may infer that a defendant intended the natural and probable consequences of his acts." (R.p. 678).

The trial court properly charged the jury that it "may infer intent." *Tart, supra.* Further, see *infra,* the State's response to the defendant's next claim.

Contention that the cumulative effect of the prosecutor's alleged improper remarks deprived defendant of a fair trial.

The defendant, in conclusion, reiterates his previous claims concerning closing remarks. The State also reiterates its arguments.

Further, the following instruction regarding opening and closing statements of counsel, was given by the trial court.

> "Opening statements and closing arguments made to you by the prosecutor and defendant's attorney are not evidence and cannot be considered by you as such. They are their personal opinions and conclusions about the evidence or lack of evidence and nothing more." (R.p. 677).

This assignment of error is without merit.

XXXII. In this assignment of error, the defendant alleges that the trial judge erred in recording a non-unanimous death verdict, and then receiving testimony and an affidavit from a juror as to her deliberations. Specifically, he alleges that the court erred when it failed to remand for further deliberations or declare a mistrial; and the court erred in allowing the juror to testify and receiving her affidavit.

When the jurors returned to the courtroom with their verdict, the verdict form was handed to the court, the court then had the clerk publish the verdict. (R.p. 690).

The verdict expressly stated that the juror unanimously determined that the defendant be sentenced to death. (R.p. 690). The jurors were asked by the clerk if that was their verdict. All jurors answered yes. The court found that the verdict was unanimous.

Subsequent to the release of the juror, it was discovered by defense and the state, that one juror, Earlene Bass, had checked, on her individual polling sheet, both recommendations of death and life.

Three days after the verdict, the prosecutor contacted Mrs. Bass and asked her if she voted life or death. Mrs. Bass responded death and the prosecutor told her that she (Bass) had checked both life *and* death. Mrs. Bass was asked if she would sign an affidavit indicating that she voted death and mistakenly checked both and Bass agreed to do so. The affidavit was prepared based upon Mrs. Bass' revelations to the prosecution. Mrs. Bass subsequently signed the affidavit.

The defendant later filed a Motion for Imposition of Sentence of Life Imprisonment and a Motion for a new trial. A hearing was conducted on September 10, 1992. (R.p. 4773-4802).

The defense claims that the state was allowed to delve into the juror's mental process and the defendant was not allowed to do so. The state disagrees. The trial court simply allowed the State to ask of Mrs. Bass her reasons for checking both life and death. The prosecutor did not ask Mrs. Bass why or how she arrived at her determination that the death sentence should be imposed.

Mrs. Bass amply explained how she managed to mark both life and death. She amply explained that *at the time of the verdict* she voted death.

All of the jurors knew, via the instructions and verdict form, that their decision, if for death, had to be unanimous. We must naturally assume that had Mrs. Bass not voted death, she would have apprised the court at the time the verdict was rendered. And just as naturally, we must assume that the foreperson would never have reported a unanimous verdict had the verdict been otherwise.

This assignment of error is without merit.

F. STRUCTURAL JUDICIAL ISSUES:

XXXIII. In this assignment of error, the defendant alleges that the judicial allotment scheme violated *State v. Simpson*, 551 So.2d 1303 (La. 1989), since it allegedly left the D.A. with the power to choose the judge to whom a particular case would be assigned.

A hearing was held on this issue, at the trial court level; on June 21, 1990 (R.pp. 1057-77). After hearing, the trial court denied the motion.

The transcript of the hearing provides a detailed description of how the Fourth Judicial District Court docket was set up subsequent to *State v. Simpson*, supra. The hearing judge ably informed defense that the State did not control the judge to whom cases were assigned. The court itself would set the date and if either party objected to the date, with valid reasons, the court would set another date. The judge sitting on that date would

hear the case. So, the rule was that the court, not the state, was ultimately in charge of the judge to whom a case was assigned.

The State submits that the principle of *Simpson* was satisfied by the Fourth Judicial District Court practice. *Simpson* condemned the practice of the State selecting the judge. The practice in the Fourth Judicial District Court prevented just that.

In any event, the courts have used a harmless error analysis in cases in which they have actually found *Simpson* violations. The courts have looked to see if the system warrants a reversal of a defendant's conviction. The questions reviewed would be such as (1) did the defendant argue prejudice and (2) does the record reveal any actual prejudice. *State v. Gomez*, 551 So.2d 1303, 1304 (La. App. 1 Cir. 1990); *State v. Claxton*, 603 So.2d 247 (La. App. 1 Cir. 1992).

The basic purpose of a random allotment system is to ensure that the accused is tried before an impartial judge. Defendant-herein does not even allege that the trial judge was biased in any manner. Therefore, if there was error in the assignment because the case was not assigned to one judge when it entered the system, the error was harmless.

The instant trial judge volunteered for this case. At no time did the defendant object to that assignment.

The defendant's assertion that *Simpson* dealt with the order in which cases were prioritized once they were allotted is misplaced. He mentions that one case was "bumped" in order to try this case. *Simpson* had nothing to do with the priority in which the cases were called for

trial subsequent to allotment. That issue was addressed in *State v. Pommier*, 25965 (La. App. 2d Cir. 1994), writ denied *State v. Pommier*, 93-3195 (La. 3/11/94), 634 So.2d 399. The court held that the State determines the priority of cases once the cases are assigned for trial.

This assignment of error is without merit.

XXXIV. In this assignment of error, the defendant claims that his trial was presided over by a judge elected in violation of the voting rights act.

A hearing was held on this issue at the trial court level (R.pp. 2002-09). The court denied the motion. As so ably stated by the trial court:

> "In case anybody desires the Court has copies of all of these decisions. Specifically *Clark, et al. v. Roemer*, No. 90-952 decided June 3rd, 1991, I'd like to address that case for a moment. That case involved a question of Section 5 of the voting rights act of 1965. And that case said a number of things, but germane to *this* case here the Supreme Court refused the plaintiff's request on appellant's request in that suit to remove any judge whose seat had not been pre-cleared by the Justice Department Office. In that same case back in October of 1990, a three judge court in Baton Rouge . . . [r]uled that this Division, Division F, which was elected earlier that month without opposition, could remain in office provisionally pending further orders of that court." (R.p. 2007).

Since that time, there has been a compromise and agreement reached by all parties and approved by the courts and the Justice Department.

This assignment of error is without merit.

CONCLUSION

The defendant's rights under the Sixth, Eighth and Fourteenth Amendments, U.S. Constitution, and Sections 2, 13, 16, 17 and Louisiana Constitution were protected. The defendant received a fair and impartial trial. The conviction and death penalty should be affirmed.

Respectfully submitted:

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CERTIFICATE

IT IS HEREBY CERTIFIED that a copy of the foregoing brief was mailed, postage prepaid, to Mr. R. Neal Walker, Attorney for Defendant, Loyola Post Conviction Defender Office, 210 Baronne Street, Suite 1343, New Orleans, LA 70112.

MONROE, LOUISIANA, on this 6th day of May, 1996.

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